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In The

Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

On Conditional Cross-Appeal From The United States District Court For The Southern District Of Mississippi

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether, as its plain language declares, 2 U.S.C. § 2a(c)(5) requires a State whose representation in Congress has been reduced after a census to elect its Representatives "from the State at large" "[u]ntil a State is redistricted in the manner provided by the law thereof."

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JURISDICTIONAL STATEMENT

Pursuant to this Court's Rule 18.4, John Robert Smith, Shirley Hall, and Gene Walker, who were plaintiffs before the United States District Court for the Southern District of Mississippi, and the Mississippi Republican Executive Committee, one of the defendants, present their conditional cross-appeal from that Court's judgment entered February 26, 2002. Cross-appellants have filed a separate motion to affirm that judgment. Only in the event that this Court should decide to set this appeal for oral argument, cross-appellants ask the Court to review the District Court's failure to order Representatives to be elected at large, as required by 2 U.S.C. § 2a(c)(5).

OPINIONS BELOW

The judgment and opinion of the District Court have been reproduced in the Appendix to Jurisdictional Statement filed in conjunction with the appeal taken by Beatrice Branch, Rims Barber, L.C. Dorsey, David Rule, James Woodard, Joseph P. Hudson, and Robert Norvel, who intervened as defendants before the District Court. The final judgment of February 26, 2002, is reproduced beginning at 1a. The Court's several opinions are reproduced in the Appendix as follows: February 26, 2002, 4a; February 19, 2002, 25a; February 4, 2002, 62a; January 15, 2002, 90a; December 5, 2001, 107a. The five opinions have not been officially reported, but may be found in reverse

chronological order at 2002 WL 313219, 2002 WL 313216, 2002 WL 313212, 2002 WL 313208, and 2001 WL 1796507.

JURISDICTION

The judgment of the District Court was entered on February 26, 2002, App. 1a, and the intervening defendants filed a timely notice of appeal that same day. App. 239a. Their Jurisdictional Statement was filed with this Court on March 28, 2002, and placed on the docket that same day. This Jurisdictional Statement on conditional cross-appeal is being filed within the thirty days permitted by this Court's Rule 18.4.

STATUTES

2 U.S.C. § 2a provides in pertinent part:

* * *

> (c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2c provides:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an

apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

STATEMENT OF THE CASE

Mississippi is currently represented by five Members of the United States House of Representatives. Under the reapportionment occasioned by the 2000 census, Mississippi's delegation was reduced to four Representatives. Consistent with the prior apportionment, Mississippi law divides the state into five districts, Miss. Code Ann. § 23-15-1037 (Rev. 2001). The Mississippi Legislature was unable to agree on a redistricting plan after the 2000 census. The Chancery Court of the First Judicial District of Hinds County ordered into effect a new plan drafted by plaintiffs, who intervened as defendants before the District Court in this action, but the District Court's final judgment enjoined state election officials from enforcing that plan. App. 1a-2a. Instead, the District Court ordered into effect a plan, which it drafted, to divide the state into four new districts. App. 2a.

Plaintiffs in this action are three Mississippi voters. On November 1, 2001, they filed their complaint with the

District Court, seeking to enjoin enforcement of the old five-district plan and to require at-large elections under 2 U.S.C. § 2a(c)(5) and Miss. Code Ann. § 23-15-1039 (Rev. 2001). They named as defendants the three elected state officers who make up the State Board of Elections Commissioners, as well as the Mississippi Republican Executive Committee and Mississippi Democratic Executive Committee, who administer the Mississippi statutes governing nominations to Congress by primary or petition. Plaintiffs asked in the alternative that the District Court devise its own redistricting plan consistent with federal law.

The next day, process was served on the three elected state officials in a separate action filed by seven voters in the Chancery Court of the First Judicial District of Hinds County, seeking the imposition of a redistricting plan as a matter of state law. Those same voters moved to intervene as defendants before the District Court, and their motion was granted on December 5, 2001. App. 107a. On December 13, 2001, the Supreme Court of Mississippi entered an order in *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), authorizing the Chancery Court to begin trial the next day and to place a congressional redistricting plan into effect. App. 110a. The following Monday, December 17, 2001, plaintiffs moved to amend their complaint, seeking to enjoin the enforcement of the order entered in *In re Mauldin* and any redistricting plan to be entered by the Chancery Court for failure to obtain the necessary approval under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The District Court granted leave to amend by order entered January 7, 2002.

The intervening defendants never answered the amended complaint. However, in their response to the motion for leave to amend, they argued that the at-large election requirement of 2 U.S.C. § 2a(c)(5) had been repealed by implication in 1967, when Congress adopted 2 U.S.C. § 2c, mandating that Representatives be elected from districts. In its order of January 15, 2002, the District Court acknowledged that plaintiffs had sought enforcement of the at-large election statutes. App. 95a. The District Court's final judgment, however, imposed a redistricting plan devised by the Court. App. 1a. At no point did the District Court explain why plaintiffs were not entitled to enforcement of the at-large election statutes.

THE QUESTION IS SUBSTANTIAL

The District Court failed without explanation to enforce an Act of Congress. Twenty years ago, two other district courts disagreed as to whether 2 U.S.C. § 2a(c) had been repealed by implication by 2 U.S.C. § 2c. *Compare Carstens v. Lamm*, 543 F.Supp. 68, 77-78 & n.23 (D. Colo. 1982), *with Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-27 (W.D. Mo.), *aff'd mem.*, 456 U.S. 966 (1982).[1] Because this issue has arisen again, and because it can arise at each reapportionment after a census, the conflict should be resolved by this Court.

[1] The question of the application of § 2a(c)(5) was not presented to this Court on appeal from the judgment in *Shayer*.

I. SECTION 2a(c) HAS NEVER BEEN REPEALED.

The adoption of 2 U.S.C. § 2a(c) in 1941, Act of November 15, 1941, c. 470, § 1, 55 Stat. 761, followed long experience with the failure of elected officials to complete the reapportionment and redistricting process after a census. As this Court recounted the history in *Wood v. Broom*, 287 U.S. 1, 6 (1932), Congress had traditionally adopted a new reapportionment by statute after each census. However, Congress failed to pass a new reapportionment after the Fourteenth Census in 1920. For the Fifteenth Census, Congress delegated to the President the responsibility of preparing a new reapportionment after each census, subject to displacement by a subsequent Act of Congress. Act of June 18, 1929, c. 28, § 22, 46 Stat. 26. It was this provision which Congress amended in 1941.

The reapportionment after the 1930 census led to extensive redistricting disputes in the states. In *Wood*, this Court reversed a judgment enjoining enforcement of Mississippi's redistricting statute for failure to achieve compactness and substantially equal population; the Court found that statutory requirements to that effect adopted after the census of 1910 had not been carried forward into the 1929 Act. 287 U.S. at 6-7, *rev'g*, 1 F.Supp. 134 (S.D. Miss. 1932). In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court upheld the validity of a veto by the Governor of Minnesota of a redistricting plan adopted by its Legislature. Because Minnesota had lost seats in the new reapportionment, this Court declared that, "unless and until new districts are created, all Representatives allotted to the state must be elected by the state at large." *Id.*, at 374-75. In *Carroll v. Becker*, 285 U.S. 380 (1932), this Court

affirmed a judgment compelling the same result in Missouri, which had lost three seats. In New York, which gained two seats, this Court affirmed a judgment requiring the old districts to be used and the two new Representatives to be elected at large. *Koenig v. Flynn*, 285 U.S. 375 (1932).

Congress would undoubtedly have been aware of this history when it amended the 1929 Act promptly after the 1940 census. Following the pattern set by this Court in *Smiley*, *Carroll*, and *Koenig*, it explicitly specified the method of election to be used "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment." As the fifth clause of § 2a(c) continues to read today, "if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large."

In 1967, after this Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Wesberry v. Sanders*, 376 U.S. 1 (1967), Congress turned again to the manner of election of Representatives. Congress did not amend the 1929 Act, but adopted a new provision, now codified as 2 U.S.C. § 2c, providing that, in each State with more than one Representative, "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." Act of December 14, 1967, Pub. L. 90-196, 81 Stat. 581. The Act bears the unusual title, "An Act for the Relief of Dr. Ricardo Vallejo Samala and to Provide for Congressional Redistricting," because it originated in the House of Representatives as a private relief bill. The language now codified as § 2c was adopted after a brief discussion on the floor of the Senate.

113 Cong.Rec. 31718-20 (1967). No committee report explaining the legislation was prepared in either House.

Although § 2c makes no mention of § 2a(c), the District Court in *Shayer* concluded that the 1967 statute repealed the 1941 statute by implication. Even through § 2c makes no mention of courts, the *Shayer* Court relied on the floor debate to conclude that it would be "mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by the State legislatures or by a Federal court." 541 F.Supp. at 927, quoting 113 Cong.Rec. 31720 (Sen. Bayh). Acknowledging that repeals by implication are not favored, the Court concluded, "Here, the plain language of section 2c is inconsistent with section 2a(c)(5), warranting a finding of repeal by implication." 541 F.Supp. at 927. That conclusion was rejected just weeks later by another District Court, which concluded that "these two statutes are not necessarily inconsistent." *Carstens, supra,* 543 F.Supp. at 77.

This Court has repeatedly stated that "repeals by implication are not favored," *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n,* 393 U.S. 186, 193 (1968). Here, § 2c establishes the general principle that Representatives should be elected from districts, but § 2a(c) addresses the specific consequences of legislative inaction. This Court has explained the rule to be applied in such situations:

> "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute governing a more generalized spectrum," *Radzanower v. Touche Ross & Co.,* 426

> U.S. 143, 148 (1976), unless the latter statute " 'expressly contradict[s] the original act' " or unless such a construction " 'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.' " *Ibid.* (quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Supra, Morton v. Mancari,* 417 U.S. [535,] 551 [(1974)].

Traynor v. Turnage, 485 U.S. 535, 547-48 (1988).

Here, § 2c and § 2a(c) are plainly "capable of co-existence." On its face, § 2c is addressed, not to the courts, but solely to the lawmaking authority "[i]n each State entitled . . . to more than one Representative." The statute instructs each such authority that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." Section 2c does not say what shall happen when, as in Mississippi, the lawmaking authority fails to establish those districts by law.

That issue is expressly addressed by § 2a(c), which applies "[u]ntil a State is redistricted in the manner provided by the law thereof." Some of those instructions may now be problematical; the requirement in § 2a(c)(1) that the old districts should continue to be used where there is no change in the size of the delegation will almost certainly conflict, because of population shifts, with the

requirement in *Wesberry* of population equality. However, there is no impediment to the enforcement of § 2a(c)(5), because *Wesberry* expressly declares that the Constitution is satisfied "when Representatives are chosen as a group on a statewide basis."[2] Thus, far from conflicting with § 2c, § 2a(c)(5) constitutes the remedy for its violation.

Because § 2c may be construed consistently with § 2a(c), this Court should conclude that the 1967 Act did not repeal the 1941 Act.

II. SECTION 2a(c) IS NOT LIMITED TO SITUATIONS WHERE A COURT LACKS TIME TO ACT.

Rejecting the conclusion in *Shayer* that § 2c and § 2a(c) are necessarily inconsistent, the District Court in *Carstens* perceived only a limited role for the at-large statute:

> Section 2c prohibits a legislature or court from deliberately designing a redistricting plan which would elect at-large representatives. Arguably, Congress did not repeal Section 2a(c)(2) because they did not want to leave a state without a remedy in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan. In this very limited circumstance, we believe that Section 2a(c)(2) provides

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[2] Although § 5 of the Voting Rights Act in some circumstances has been held to invalidate state laws requiring election from multimember districts, *Thornburg v. Gingles*, 478 U.S. 30 (1986), § 5 on its face has no application to acts of Congress.

> emergency statutory relief from an otherwise unconstitutional situation.

543 F.Supp. at 77-78 (footnote omitted).[3]

The *Carstens* Court gave no explanation for its conclusion that § 2c places any prohibition upon a court. However, the assumption that the statutory scheme is addressed to courts as well as legislatures was central to its analysis. The Court's discussion concluded, "There is nothing in the language of Section 2a(c)(2) which indicates that Congress intended to bar the federal courts from providing timely assistance to the state in resolving a redistricting dispute." *Id.*, at 78. The Court assumed that Congress intended the federal courts to exercise power unless that power had been explicitly withdrawn.

Congress, however, could have entertained no such assumption in 1929, when it adopted § 2a(c). The Constitution in Article I, § 4 gives primary control over federal elections to the state legislatures, vesting supervisory authority in Congress, not the courts. In exercising that supervisory authority in 1929, Congress addressed § 2a(c) to legislatures and state election authorities, expecting them to execute its provisions. It was not intended as an emergency measure should the courts fail to act, because Congress would have had no reason to expect the courts to act.

Of course, by 1967, courts had begun to act, taking control of redistricting decisions after *Baker* and *Wesberry*.

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[3] The second clause of § 2a(c) applies where a state has increased its representation; until redistricting is completed, the new Representatives are to be elected at large.

It would not have been unreasonable to expect that § 2c would give explicit directions to courts for resolving those controversies. However, no such intent can be discerned from the language itself. The statute tells states that districts should be "established by law," but it gives no direction to courts.[4]

Certainly, nothing in § 2c modifies the explicit terms of § 2a(c). If the 1929 Act has not been implicitly repealed, then it retains the same meaning it had in 1929. It is an instruction to state election authorities to elect Representatives at large under the circumstances now presented in Mississippi. The District Court should have ordered those election officials to comply with the law.

CONCLUSION

In the event that this Court chooses to set this appeal for oral argument, then, for the reasons stated herein, the judgment of the District Court should be reversed, and

[4] The *Carstens* Court quoted Senator Bayh's statement that § 2c was intended to bind federal courts, 548 F.Supp. at 77 n.23, but did not rely upon it to support its holding. This Court ordinarily will "give no weight to a single reference by a single Senator during floor debate in the Senate," *Bath Iron Works Corp. v. Director*, 506 U.S. 153, 166 (1993), particularly where the proposed construction "is in no way anchored in the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994).

the Defendants should be ordered to conduct elections for Mississippi's Representatives at large.

Respectfully submitted,

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On Conditional Cross-Appeal From The United States District Court For The Southern District Of Mississippi

CONDITIONAL MOTION TO AFFIRM

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CONDITIONAL MOTION TO AFFIRM

In their conditional cross-appeal, the Mississippi Republican Executive Committee (MREC) and the federal court plaintiffs contend that while the Federal District Court properly enjoined the state court plan, it should have imposed at-large elections for Mississippi's members of Congress rather than devise a single-member district plan. This issue will be relevant only if this Court affirms the District Court's injunction against the state court plan in the course of resolving the main appeal (No. 01-1437). In the event that happens, the Branch intervenors, who are appellants in the main appeal and cross-appellees here, conditionally move to affirm the District Court's rejection of at-large elections.

Because this issue will be relevant only if the District Court's injunction against the state court plan is affirmed, this Court is free to delay a decision on the cross-appeal until the main appeal is resolved. If that injunction is reversed, the cross-appeal can then be dismissed as moot. If affirmed, this Court can then summarily affirm on the cross-appeal, as we suggest in this conditional motion, or note probable jurisdiction and schedule the matter for argument.

As an initial matter, it appears this issue has been waived. For example, in its February 4, 2002 order announcing a redistricting plan, the Federal District Court said: "The parties are directed to show cause by written objections [filed by February 9], why this court's redistricting plan . . . would not satisfy all state and federal statutory and constitutional requirements. . . Failure to object in accordance with this order will be deemed a waiver of all further objections to this plan." No. 01-1437, J.S. App. 62a-63a. In response, the federal court plaintiffs and the MREC filed comments saying the plan "satisfies all constitutional and statutory criteria." Appendix. They never objected there or elsewhere to the Court's failure to require at-large elections. (The plaintiffs did request at-large election relief in their complaint, but as just mentioned, did not

object in response to the February 4 order).

Turning to the merits, all members of the United States House of Representatives are elected by districts except in those states that elect only one representative. This conforms with 2 U.S.C. § 2c, adopted in 1967, which provides:

> In each State entitled . . . to more than one Representative . . ., there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from Districts so established . . . .

(Emphasis added).

The position advocated by the cross-appellants would change that. They contend that federal law, specifically 2 U.S.C. § 2a(c)(5), requires courts to impose at-large elections if state legislatures do not produce a lawful congressional redistricting plan after the loss of a seat. Under their view, another subdivision of that statute, § 2a(c)(2), would require at-large elections for any new seats if the number of House members increased after the census and no plan were adopted by the legislature. Thus, if the cross-appellants are correct, congressional elections in a number of states where courts imposed redistricting plans after a loss or gain of seats will convert from districts to total or partial at-large balloting, including Mississippi, Texas, and Colorado. *See, Balderas v. Texas*, No. 6:01cv158 (E.D. Tex. Nov. 14, 2001); *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002).

Not only does federal law not require this, however; it prohibits it. As just mentioned, 2 U.S.C. § 2c, mandates that "Representatives shall be elected *only from Districts*" in states with more than one representative. (Emphasis added). This statute, adopted in 1967, supersedes the 1941 statute upon which the cross-appellants rely, 2 U.S.C. § 2a(c). As this Court

stated in *Whitcomb v. Chavis*, 403 U.S. 124, 159 n. 39 (1971):

> In 1941, Congress enacted a law that required that . . . if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. . . . In 1967, Congress *reinstated the single-member district requirement.*"

(Emphasis added). Although this language is dictum, it makes perfect sense. Most of the lower courts that have addressed the question appear to agree that the 1967 statute supersedes the one from 1941. *See, Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo. 1982) (three-judge court) ("we conclude that the later statute, section 2c, repealed section 2a(c)(5) by implication," so that "the only appropriate remedy is a court-ordered apportionment" rather than at-large elections), *aff'd mem. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal. 1982) ("Congress intended 2c to supersede the provisions of section 2a, subdivision (c)" and "an at-large election . . . would contravene the congressional mandate set forth in section 2c.")

The cross-appellants cite only one case to the contrary, *Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982), and even it does not support their position. In *Carstens*, the Court held that § 2c did not repeal § 2a(c), but instead left the provisions of § 2a(c) in place for use "in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." *Id.* at 77-78. In the present case, of course, there was time for the courts to develop a plan and there was no need to resort to the drastic step of at-large elections.

The cross-appellants' only answer to this is that the

provisions of § 2c are to be enforced only by legislatures, not courts. This is true, they say, because in passing § 2c in 1967, Congress did not "give explicit directions to courts for resolving those controversies." Of course, courts enforce federal statutes all the time even though the words of the statutes do not explicitly mention courts. Most federal statutes that are binding upon states — such as Section 2 of the Voting Rights Act, 42 U.S.C. § 1973c — do not explicitly refer to courts. Yet courts enforce them when the states do not. Nothing about § 2c suggests that Congress in 1967 intended for the courts to ignore the statute when faced with the need to adopt a congressional redistricting plan. Indeed, if courts cannot enforce the provisions of § 2c, passed in 1967, it would follow that they also cannot enforce the provisions of the statute upon which cross-appellants rely — § 2a(c)(5), passed in 1941 — inasmuch as the language of the latter does not explicitly direct itself to courts.

Yet the cross-appellants contend that the phrase "by law" from § 2c is what demonstrates that Congress, when passing that provision in 1967, intended that it only be enforced by legislatures and not courts. But surely those words do not mean that courts — entrusted with implementing federal law when states fail to do so — should abstain with respect to this one particular statute. If Congress had intended in 1967 to preclude federal courts from enforcing this particular statute, it would have said so in words much more explicit than these. It did not.

Finally, even if the cross-appellants were otherwise correct, the imposition of at-large elections in Mississippi would lead to a dilution of black voting strength in violation of Section 2 of the Voting Rights Act as well as retrogression in violation of Section 5 of the Act, 42 U.S.C. § 1973c. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *aff'd mem.*, 469 U.S. 1002 (1984) (electing all members of Congress

in Mississippi from majority-white districts violates Section 2). According to the cross-appellants, the Voting Rights Act does not apply to acts of Congress. However, under the cross-appellants' theory, at-large elections are the consequence of the failure of the Mississippi legislature to adopt a redistricting plan. Thus, that failure by the state, and the resulting implementation of at-large elections, would be subject to scrutiny under the Voting Rights Act.

For all of these reasons, the conditional cross-petition should be dismissed as moot. Alternatively, in the event the District Court's injunction against the state court plan is affirmed, the refusal to impose at-large elections also should be affirmed.

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER — PLAINTIFFS

V. — CIVIL ACTION NO. 3:01CV855WS

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General for the State of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE — DEFENDANTS

(Filed Feb. 8, 2002)

COMMENTS OF THE PLAINTIFFS AND MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE

COME NOW plaintiffs and defendant Mississippi Republican Executive Committee and respond as follows to the request for comments set forth in this Court's order of February 4, 2002:

1. Plaintiffs and the Mississippi Republican Executive Committee have no objection to the plan devised by the Court. It satisfies all constitutional and statutory criteria and can be defended on neutral redistricting principles. Although plaintiffs and the Mississippi Republican Executive Committee offered several plans which also

meet those criteria, the plan adopted by the Court is entirely satisfactory.

2. However, plaintiffs and the Mississippi Republican Executive Committee do have one comment on this Court's analysis of its plan. The Eighth factor taken into consideration by the Court was its effort "to includ[e] as much of the currently existing districts 3 and 4 in the new combined District 3 as possible." Analysis at 4. Although many of the witnesses advocated such an objective, the Court's analysis does not give an explanation of its legal significance. Such an explanation would be useful in the event that the plan should be challenged on appeal.

3. Plaintiffs and the Mississippi Republican Executive Committee do not agree with the analysis given by the Chancery Court in support of its decision to combine old Districts 3 and 4 that "fairness to the incumbents is a paramount consideration." Opinion of December 21, 2001, at 14. Whatever consideration this Court may have given to that factor was properly secondary. In *Balderas v. Texas*, No. 6:01CV158 (E.D. Tex. Nov. 14, 2001), the Court considered political issues only after the plan had been completed to see whether it "was avoidably detrimental to Members of Congress of either party holding unique, major leadership posts," and whether the plan was "likely to produce a congressional delegation roughly proportional to the party voting breakdown across the state." Slip op. at 8-9. Accord, *Good v. Austin*, 800 F.Supp. 557, 566-67 (E.&W.D. Mich. 1992). To the extent that this Court considered the effect of the combination of old Districts 3 and 4 on the two incumbents simply as a check

upon its plan, that practice is fully consistent with federal precedent.[1]

4. The combination of old Districts 3 and 4 can also be justified neutrally as a product of population changes. For instance, where Texas gained congressional seats, the *Balderas* Court accepted the suggestion of Dr. John Alford that "the most natural and neutral locator is to place [new seats] where the population growth that produced the new additional districts has occurred." Slip op. at 6. By the same logic, where Mississippi has lost a seat, it would seem most logical to combine the two old districts with the least population. Senator Kirksey did so by combining portions of old District 4 into old District 2. Because that course raises at least potential problems under § 2 of the Voting Rights Act, 42 U.S.C. § 1973, this Court's decision to combine the two smallest unprotected districts makes good sense.

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[1] *Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991), upon which the Branch Intervenors have previously relied, does not authorize the use of politics as a guiding principle. There, incumbent Democratic Members of the Illinois congressional delegation claimed that the Republican plan would "result in a politically unfair distribution of congressional seats between Democrats and Republicans", *id.*, at 656, in the manner forbidden by *Davis v. Bandemer*, 478 U.S. 109 (1986). The District Court rejected that claim, finding that the plan was "likely to yield the distribution of seats across party lines that mirrors the statewide partisan makeup of the voting citizenry." *Id.*, at 659. No party has raised a *Davis v. Bandemer* challenge to any of the plans considered by this Court.

5. This Court's order does not explain what it might consider to be "the timely preclearance of the redistricting plan adopted by the State Chancery Court." In the event that preclearance is not received before the qualifying date of March 1, 2002, there may be no need for this Court to address other issues presented by the complaint. Nevertheless, plaintiffs and the Mississippi Republican Executive Committee do not waive their contentions, and expressly assert them in the alternative, that the adoption of a congressional redistricting plan by a state court acting under state law violates Article I, § 4 of the Constitution, and that the implementation of the Supreme Court's assignment of redistricting authority to the Chancery Court without obtaining approval under § 5 should result in the invalidation of the results of that trial even if approval is subsequently obtained. Moreover, as previously stated in response to questions from the court, potential candidates need time to evaluate the new district lines and to make their decisions. For that reason, this Court's plan should take effect for the 2002 election if the Chancery Court plan has not been approved by February 15, 2002.

WHEREFORE, PREMISES CONSIDERED, plaintiffs and the Mississippi Republican Executive Committee pray that this Court will consider these comments offered pursuant to this Court's order of February 4, 2002.

Respectfully submitted,

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER

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Nos. 01-1437 & 01-1596

In The
Supreme Court of the United States

BEATRICE BRANCH, *et al.*,

Appellants, Cross-Appellees,

v.

JOHN ROBERT SMITH, *et al.*,

Appellees, Cross-Appellants.

On Appeal From The United States District Court For The Southern District Of Mississippi

JOINT APPENDIX

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Conditional Cross-Appeal Filed April 26, 2002
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APPENDIX 1

U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (JACKSON)

No. 01-CV-855

Smith, et al.

v.

Clark, et al.

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
11/1/01	COMPLAINT.
11/1/01	Magistrate Judge Assignment James C. Sumner.
11/1/01	Case assigned to Pending Track - designation of appropriate track will be made after Case Management Conference and a final track assignment.
11/2/01	SUMMONS(ES) issued for defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove, defendant MS Republican Pty., defendant MS Democratic Party
11/8/01	MOTION by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker for Preliminary Injunction

Date	PROCEEDINGS
11/9/01	MOTION by movant Richard Barrett to Intervene by Richard Barrett
11/9/01	AFFIDAVIT by movant Richard Barrett Re: [3-1] motion to Intervene by Richard Barrett by movant.
11/13/01	ANSWER to Complaint by defendant MS Republican Pty. (Attorney Michael B. Wallace).
11/14/01	RESPONSE by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to [2-1] motion for Preliminary Injunction by plaintiffss and CROSS-MOTION, to Dismiss.
11/14/01	Rule 16.1(A) Initial Order; copies mailed.
11/14/01	Telephonic Case Management Conference set 10:30 1/22/02 location: Jackson, MS before Magistrate Judge James C. Sumner copies mailed to Michael B. Wallace, Arthur F. Jernigan Jr.
11/16/01	ORDER, Response to Motion reset to 11/26/01 for [6-2] motion, Reply to Response to Motion reset to 11/29/01 for [6-2] motion. Court intends to request certification of 3-judge court to address motion for preliminary injunction as well as State Defendants' motion to dismiss (signed by Judge Henry T. Wingate).
11/21/01	Minute entry: Hearing held on 11/14/01 before Judge Wingate, CR. Brenda Wolverton; Status Conference held a schedule was initiated.

Date	PROCEEDINGS
11/21/01	ORDER the Chief Judge of the US Court of Appeals for the Fifth Circuit designates Henry T. Wingate, E. Grady Jolly and David C. Bramlette, III, U. S. circuit and district judges as members of the three-judge district court to hear and resolve this matter.
11/21/01	Case assigned to panel of Judge Henry T. Wingate and Judge E. G. Jolly and Judge David C. Bramlette III
11/21/01	RESPONSE by defendant MS Democratic Party to [2-1] motion for Preliminary Injunction by plaintiffs.
11/26/01	RESPONSE by defendant MS Republican Pty. to [2-1] motion for Preliminary Injunction by plaintiffs
11/28/01	NOTICE of Hearing: Motion Hearing set for 3:00 11/30/01 for [6-2] motion, set for 3:00 11/30/01 for [3-1] motion to Intervene by Richard Barrett, set for 3:00 11/30/01 for [2-1] motion for Preliminary Injunction.
11/29/01	MOTION by movants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph P Hudson, Robert R. Norvel Sr. to Intervene
11/30/01	REPLY by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to response to [6-2] motion by defendants.

Date	PROCEEDINGS
12/4/01	NOTICE of Submission of Intervenors regarding recent State Court Developsments by movants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph P Hudson, Robert R. Norvel Sr.
12/5/01	ORDER granting [14-1] motion to Intervene, denying [6-2] motion, denying [3-1] motion to Intervene by Richard Barrett, deferred [2-1] motion for Preliminary Injunction
12/6/01	NOTICE of Attorney Appearance for defendant MS Democratic Party by John G. Jones, Herbert Lee Jr. in place of Shane Langston and Omar Nelson
12/18/01	RESPONSE by defendant MS Republican Pty. to Motion for Leave to Amend and For Preliminary Injunction.
12/19/01	NOTICE of Hearing: Motion for Leave to Amend and for Preliminary Injunction set before three-judge court 12/28/01 at 3:00p.m.
12/20/01	MOTION by plaintiffs for Preliminary Injunction, for Leave to File Amended Complaint
12/21/01	RESPONSE by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to [21-1] motion for Preliminary Injunction by plaintiffs, [21-2] motion for Leave to File Amended Complaint by plaintiffs

Date	PROCEEDINGS
12/21/01	RESPONSE by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to [21-1] motion for Preliminary Injunction by plaintiffs, [21-2] motion for Leave to File Amended Complaint by plaintiffs
12/28/01	Motion hearing held re: redistricting plan
1/7/02	ORDER granting [21-2] motion for Leave to File Amended Complaint; Granting Motion for Branch and Barber to Intervene; Motion for Preliminary Injunction deferred; Briefing Schedule established as set out herein
1/8/02	AMENDED COMPLAINT by plaintiffs John Robert Smith, Shirley Hall, Gene Walker
1/9/02	SUPPLEMENTAL RESPONSE by defendants Eric Clark, Mike Moore, Ronnie Musgrove to [21-1] motion for Preliminary Injunction by plaintiffs
1/9/02	MOTION to Intervene by Jimmy D. Giles
1/10/02	Supplemental RESPONSE by intervenor-defendant Beatrice J. Branch, et al., to [21-1] motion for Preliminary Injunction.
1/10/02	ORDER denying [27-1] motion to Intervene by Jimmy D. Giles
1/10/02	Minute entry: Hearing held 12/28/01 before Judges Jolly, Wingate, Bramlette in Jackson, MS, on redistricting plan. Carol Gray c/r. ACTION TAKEN: Under advisement.

Date	PROCEEDINGS
1/10/02	EXHIBITS TO REDISTRICTING HEARING
1/11/02	MOTION by movant Jimmy D. Giles For Rehearing EN BANC
1/11/02	Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
1/15/02	ORDER, that because it now appears to be uncertain that the State authorities will have a redistricting plan in place by 3/1/02, Federal authorities will assert jurisdiction. Accordingly, Federal authorities will begin the process of drafting and implementing a plan for reapportioning Mississippi's congressional districts. In accordance with this order, a scheduling conference is set Scheduling Conference for 3:30 1/16/02
1/18/02	Letter requesting attachment of Exhibits to Amended Complaint by plaintiff John Robert Smith
1/18/02	SCHEDULING ORDER setting Designate experts for plaintiff by 3:00 1/18/02 ; Designate experts for defendant by 3:00 1/18/02 ; Parties shall exchange exhibits by 5:00 1/23/02; Any party may take depositions at any time inclusive of 1/19-24/02; Pretrial order is due by 2:00 1/25/02; Trial set 9:30 1/28/02 and shall conclude no later that 5:00 on 1/29/02; Telephonic Case Management Conference previously scheduled 10:30 1/22/02 is CANCELED.

Date	PROCEEDINGS
1/25/02	MOTION by movant Kenneth J. Goodwin for Consideration of Redistricting Map.
1/28/02	Submission of Mississippi Farm Bureau Federation Relating to Congressional Redistricting.
1/28/02	TRANSCRIPT filed for dates of 12/28/01 on Hearing on Motion for Preliminary Injunction
1/29/02	EXHIBIT/WITNESS LIST TO HEARING HELD 1/28/02 AND 1/29/02
1/29/02	Minute entry: Redistricting Hearing held 1/28/02 and 1/29/02 before Judges Jolly, Wingate and Bramlett in Jackson, MS. CR: Brenda Wolverton; Action Taken: Parties declined presentation of closing summations. Post Trial Briefs may be filed with deadline of 1/31/02.
1/29/02	PRETRIAL ORDER filed
1/30/02	NOTICE of Filing of Submission of the Attorney General to United States Department of Justice and the State Court Record with the Clerk of Court on 1/18/02 by plaintiff John Robert Smith, plaintiff Gene Walker
1/30/02	Letter from David Webb with redistricting plan map attached.
1/31/02	Post-Trial Submission of Intervenors
2/1/02	TRANSCRIPT filed for dates of 1/28/02-1/29/02
2/4/02	ORDER with attached Courts congressional redistricting plan for the State of Mississippi. Objections due by 2/9/02 at 4:00p.m.

Date	PROCEEDINGS
2/8/02	Second Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
2/8/02	Comments of the Plaintiffs and Mississippi Republican Executive Committee
2/8/02	Response by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to [44-1] order
2/15/02	NOTICE of Receipt of Letter from United States Department of Justice by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove
2/15/02	Further submission/Attachment by Beatrice J. Branch,-et al., intervenor-defendants, in opposition to motion for injunctive relief
2/15/02	Third Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
2/19/02	ORDER that parties are directed to address by simultaneous letter briefs to question set out herein by 5:00p.m.
2/19/02	OPINION that if Chancery Court plan has not been precleared before the close of business 2/25/02, the plan attached to Order of 2/4/02 shall operate as the plan for congressional districts for the State of Mississippi for 2002 congressional elections and, on 2/26/02, an injunction shall be entered directing

Date	PROCEEDINGS
	defendants to conduct 2002 congressional elections pursuant to the congressional redistricting plan attached to 2/4 order.
2/19/02	MOTION by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to Stay, and For Injunction
2/19/02	RESPONSE by plaintiffs John Robert Smith, Shirley Hall, Gene Walker to [53-1] motion to Stay by intervenor-defends
2/20/02	ORDER denying [53-1] motion to Stay, denying [53-2] motion For Injunction
2/21/02	PRETRIAL ORDER filed
2/21/02	Fourth Supplemental Submission of Mississippi republican Executive Committee in connection with Motion for Preliminary Injunction
2/25/02	Intervenors Additional Further Submission in Opposition to Plaintiff's Motion for Injunctive Relief
2/26/02	OPINION and ORDER in the light of the foregoing analysis, the congressional redistricting plan adopted by the chancery court is declared unconstitutional, and the state's implementation of the chancery court plan is enjoined, as per our Final Judgment entered today.
2/26/02	FINAL JUDGMENT For reasons stated in opinions of 2/29/02, and 2/26/02, defendants are hereby enjoined from implementing the

Date	PROCEEDINGS
	congressional redistricting plan adopted by Chancery Court for the First Judicial District of Hinds County, Mississippi. The defendants are enjoined from implementing the former five-district congressional redistricting plan. The defendants implement the congressional redistricting plan adopted by this court in its order of 2/4/02, for conducting congressional primary and general elections for the state of Mississippi in 2002. Defendants shall use the congressional redistricting plan adopted by this court in its order of 2/4/02, in all succeeding congressional primary and general elections for the State of Mississippi. This court shall retain jurisdiction to implement, enforce, and amend this order as shall be necessary and just.
2/26/02	Case closed.
2/26/02	NOTICE OF APPEAL to Supreme Court by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr.
3/8/02	MOTION by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker for Attorney Fees
3/12/02	NOTICE of filing of Affidavit of Pat H. Scanlon in Support of Motion for Attorney's Fees by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker

Date	PROCEEDINGS
3/19/02	MOTION by defendants Eric Clark, Mike Moore, Ronnie Musgrove To Hold in Abeyance, or to Extend Time to Respond to Motion for Attorney Fees
4/23/02	MOTION by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to Declare that the State Court Plan in now Precleared under Section 5 of the Voting Rights Act
5/6/02	Letter from Supreme Court advising an appeal was filed 4/26/02 and placed on docket 4/29/02
5/28/02	TRANSCRIPT filed for dates of 11/14/01
6/3/02	ORDER denying [65-1] motion to Declare that the State Court Plan in now Precleared under Section 5 of the Voting Rights Act.

APPENDIX 2

IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL **PLAINTIFFS**

vs. **No. G-2001-1777 W/4**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi **DEFENDANTS**

AMENDED COMPLAINT

(Filed Oct. 17, 2001)

This action for injunctive relief is brought to insure compliance with Mississippi law regarding the timing of congressional elections in the State of Mississippi.

1. Plaintiffs Beatrice Brance and Rims Barber are residents and registered voters of Hinds County, Mississippi and the presently existing Fourth Congressional District. David Rule and Melvin Horton are residents and registered voters of Holmes County, Mississippi and the presently existing Second Congressional District. Plaintiff James Woodard is a resident and registered voter of Webster County, Mississippi and the presently existing First Congressional District. He also is an elected Supervisor in Webster County. Plaintiff Joseph P. Hudson is a resident and registered voter of Harrison County, Mississippi and the presently existing Fifth Congressional District. Plaintiff Robert Norvel is a resident and registered voter of Jackson County, Mississippi and the presently

existing Fifth Congressional District. He also is an elected supervisor in Jackson County. These plaintiffs have an interest in participating as voters in the regularly scheduled 2002 elections for members of Congress from the State of Mississippi. They also have an interest in insuring that the provisions of Mississippi law relating to the scheduling of those election are fully enforced.

2. Defendant Eric Clark is the Secretary of State of Mississippi. Defendant Mike Moore is the Attorney General of Mississippi. Defendant Ronnie Musgrove is the governor of Mississippi. Pursuant to § 23-15-211(1) of the Mississippi Code, the three of them constitute the State Board of Election Commissioners of the State of Mississippi. As occupants of the offices they hold, and as members of the State Board of Election Commissioners, they are responsible for the implementation and enforcement of Mississippi's election laws. They are sued in their official capacities as occupants of the offices they hold and as members of the State Board of Election Commissioners.

3. Mississippi law requires that the first step in decennial redistricting of congressional districts occur by December 3, 2001. Pursuant to § 5-3-123 and § 5-3-129 of the Mississippi Code, the Standing Joint Congressional Redistricting Committee of the Mississippi legislature must draw a congressional redistricting plan and present it to the legislature and governor no later than thirty days preceding the convening of the next regular session of the legislature after the publication of the results of the decennial census. The decennial census results were published in early 2001. The next regular session of the legislature convenes January 2, 2002. See Miss. Code

§ 5-1-7. Thus, the Committee's plan must be presented to the legislature and governor no later than thirty days prior to January 2, which is December 3, 2001.

4. Mississippi law requires that qualification of candidates running for Congress in the 2002 elections occur by March 1, 2002. See Miss. Code § 23-15-299. The new districting plan must be enacted well in advance of that time in order for the qualification to occur as scheduled.

5. As of the present time, the Joint Congressional Redistricting Committee has yet to adopt, recommend, or present a plan to the legislature and governor. The legislature has yet to adopt or implement a plan. Unless the legislature adopts a plan in time for it to be implemented in advance of the March 1 qualifying deadline, the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws will be compromised, and their rights under Mississippi law to participate in a congressional election process conducted in a timely manner will be violated.

6. This Court has jurisdiction of actions for injunctive relief of this type.

7. In the event the Committee fails to recommend, and the legislature fails to adopt, a congressional redistricting plan in a timely manner, it will be the duty of this Court to insure enforcement of the laws and to adopt and implement a congressional redistricting plan so that the plan can be in place in sufficient time for the candidate qualification and election process to go forward according to the schedule established by Mississippi law.

Accordingly, the plaintiffs request that this Court assume jurisdiction of this cause and further request that, in the event a congressional redistricting plan is not adopted by the legislature in a timely manner, this Court proceed to hold a hearing and issue an injunction adopting and directing the implementation of a congressional redistricting plan for the State of Mississippi that allows the candidate qualification and election process to go forward as required by Mississippi law. The plaintiffs also request any other relief to which they are entitled.

Respectfully submitted,

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/s/ Carlton W. Reeves
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COUNSEL FOR PLAINTIFFS

APPENDIX 3

**IN THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; MELVIN HORTON; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,

Plaintiffs,

vs. **No. G-2001-1777 W/4**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi,

Defendants.

SUPPLEMENTAL RESPONSE OF THE PLAINTIFFS TO THE PENDING MOTIONS TO DISMISS

This supplemental response summarizes and adds to the two responses previously filed by the plaintiffs in opposition to (1) the supplemental motion to dismiss of the defendants (response filed November 26, 2001, and (2) the motion to dismiss of the intervenors (response filed November 28, 2001). Because the two motions make different arguments, we believe it useful to summarize our arguments to both motions in a single response and to elaborate upon at least one of those arguments.

I.

Both the defendants and the intervenors contend this Court has no subject mater jurisdiction. But the United

States Supreme Court has said that "state courts have a significant role in redistricting," *Growe v. Emison*, 507 U.S 25, 33 (1993), and also has said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." *Id., quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965). The Mississippi Supreme Court has made it clear that chancery courts have jurisdiction in election law cases such as this one. *Carter v. Lake*, 399 So.2d 1356, 1357-1358 (Miss. 1981); *Adams County Election Commissions v. Sanders*, 586 So.2d 829, 380 (Miss. 1991). *See also, Hathorn v. Lovorn*, 457 U.S 255, 269-270 (1982).[1]

II.

The intervenors argue that the only remedy for this situation is an at-large statewide election for all members of Congress pursuant to Miss. Code § 23-15-1039. They contend, accordingly, that this Court has no jurisdiction. As we previously noted in our response to the intervenors' motion, their argument regarding this remedy in no way deprives this Court of jurisdiction. Moreover, this is not a viable remedy for a number of reasons.

In filing this case, we have asked this Court to enforce Mississippi law and implement an election plan that complies with Mississippi law. Mississippi law sets

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[1] These authorities are discussed in more detail at pages 2-9 of our response to the defendants' supplemental motion to dismiss.

out an election schedule that requires candidate qualification on March 1, 2002, primary elections on June 4, 2002, and the general election on November 5, 2002. Mississippi law also clearly contemplates and requires election of members of Congress by districts. *See*, Miss. Code § 23-15-1033 ("Representatives in the Congress of the United States shall be chosen *by districts* on the first Tuesday after the first Monday of November in the year 1986, and every two (2) years thereafter. . . . "); § 5-3-123 (members of the Standing Joint Congressional Redistricting Committee of the legislature shall draw a plan to redistrict no later than 30 days preceding the next regular session of the legislature and shall submit it to the Governor and the legislature).[2]

But the intervenors contend that the remedy for a legislative impasse resulting from a decrease in the number of seats is set out in Miss. Code § 23-15-1039. They argue that this statute requires at-large elections. However, the statute does not, in fact, require at-large elections. Instead, it mandates at-large balloting only if the election is actually held "before the districts have changed to conform to the new apportionment." The present case is being brought so that this Court can adopt

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[2] Although the legislature obviously can adopt a plan without a recommendation from the Committee, the state law giving the Committee the authority to draw such a plan clearly contemplates that districts will be used. Otherwise, there would be no need to draw a plan. And, as just mentioned, § 23-15-1033 specifically states that members of Congress "shall be chosen by districts." *See also, Adams County Election Commission v. Sanders*, 586 So.2d at 381 (referring to the one-person, one-vote principle of Art 3, § 14 of the Mississippi Constitution).

and implement a redistricting plan containing four congressional districts in time for the 2002 election schedule. Once that is done, the "districts [will] have changed to conform to the new apportionment," and there will be no need for at-large elections under the statute. Nothing in that statute remotely suggests that this Court, as a court of equity, does not have the authority to implement a districting plan in the wake of the legislative default that has occurred here. Thus, the statute does not require at-large elections in the situation that exists here, and it does not deprive this Court of jurisdiction.

Even if the statute did require at-large elections under the present circumstances, that remedy could not be imposed because it would be unlawful both as a matter of Mississippi constitutional law and federal law. First, at-large elections would specifically violate the federal statute requiring election of congressional representatives from districts.[3] 2 U.S.C. § 2c states:

> In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from Districts so established . . . .

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[3] As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution.

(Emphasis added).[4] Second at-large elections would dilute back voting strength by requiring that all members of Congress be elected from a majority-white electorate. This dilution would violate both Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the equal protection component of Article 3, Section 14 of the Mississippi Constitution. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *summary aff'd*, 469 U.S. 1002 (1984) (requiring that a majority black congressional district be created in Mississippi).

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[4] In 1941, the Congress passed a statute that would have allowed the remedy of at-large elections where the state lost a seat and failed to redistrict. *See*, 2 U.S.C. § 2a(c)(5). But in 1967, Congress passed the statute just quoted in the text of this brief, 2 U.S.C. § 2c, which specifically mandates that "Representatives shall be elected *only from districts*." (Emphasis added). As the United States Supreme Court stated in *Whitcomb v. Chavis*, 403 U.S 124, 159 n. 39 (1971): "In 1941, Congress enacted a law that required that . . . if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. . . . In 1967, Congress *reinstated the single-member district requirement*." (Emphasis added). *See also, Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo. 1982) (three-judge court) ("we conclude that the later statute, section 2c, repealed section 2a(c)(5) by implication," so that "the only appropriate remedy is a court-ordered apportionment" rather than at-large elections), *summarily affirmed sub. nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal. 1982) ("Congress intended 2c to supersede the provisions of section 2a, subdivision (c)" and "an at-large election . . . would contravene the congressional mandate set forth in section 2c.").

For all of these reasons, at-large elections are not a viable option, and Miss. Code § 23-15-1039 does not deprive this Court of jurisdiction.

III.

In the supplemental motion to dismiss, the Attorney General contends that the three defendants, the Governor, the Secretary of State, and the Attorney General, are not proper defendants. But in a line of Mississippi redistricting cases going back some 35 years, these three officials always have been the lead state defendants. *See, e.g., Connor v. Johnson*, 256 F.Supp. 962, 963-964 (S.D. Miss. 1966) (legislative and congressional redistricting); *Jordan v. Winter*, 541 F.Supp. 1135, 1137 (N.D. Miss. 1982) (congressional redistricting); *Martin v. Allain*, 658 F.Supp. 1183, 1186 (S.D. Miss. 1987) (judicial districts); *Watkins v. Mabus*, 771 F.Supp. 789, 792 (S.D. Miss. 1991) (legislative redistricting); *NAACP v. Fordice*, 252 F.3d 361, 364 (5th Cir. 2001) (public service and transportation commissioners).[5] Neither the courts nor the Mississippi Attorney

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[5] Some of these cases also have named legislative leaders as defendants, while others have not (and in one case the legislators voluntarily intervened). The absence of them as defendants in some of the cases suggests, of course, that they are not necessary parties. This is particularly true in light of the fact that the plaintiffs in the present case are not asking the Court to order the legislature to do anything. Instead, the plaintiffs are simply asking that the Court implement a lawful plan for the congressional elections in the event the legislature does not do so on its own. As indicated by the cases just cited, these three state officials – as occupants of their offices and as members of the State Board of Election Commissioners – are the proper defendants for that purpose. If the legislative leaders

General appear ever to have raised a question about whether these are the proper defendants. Moreover, in the parallel federal case that is presently pending and that relates to congressional redistricting, the Attorney General has not filed any motion to dismiss based on this ground, and has not suggested to the court that these are improper defendants.

Clearly, these are proper defendants to represent the interests of the State of Mississippi and to implement any new redistricting plan if the legislative impasse continues and this Court is required to order equitable relief. *See, Connor v. Finch*, 469 F.Supp. 693, 694 (S.D. Miss. 1979) (imposing new districting plan for legislative elections by issuing injunction solely against Governor, Secretary of State, and Attorney General). These three officials comprise the State Board of Election Commissioners. They all are responsible for upholding and enforcing Mississippi law, and the Secretary of State is the state's chief election officer. This is not a basis for dismissing this case.[6]

IV.

The intervenors contend that the Republican and Democratic executive committees are indispensable parties for the purpose of imposing the remedy. But the committees were not parties in at least some of statewide redistricting litigation that has occurred in Mississippi

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wish to participate, they are free to file a motion to intervene or motion for leave to participate *amicus curiae*.

[6] This is discussed more at pages 9-10 of our response to the defendants' supplemental motion to dismiss.

over the years and that has led to new redistricting plans – particularly the thirteen year battle over legislative districts that lasted from 1966-1979. *See, Connor v. Johnson,* 256 F.Supp. at 963-964; *Connor v. Finch,* 469 F.Supp. at 694. *See also, Grove v. Emison,* 507 U.S. at 27-28; *Emison v. Growe,* 782 F.Supp. 427 (D. Minn. 1992) (three-judge court) (political parties were not defendants in either the state or federal court congressional redistricting cases that led to the Supreme Court's decision in *Growe,* and no one suggested they were necessary parties for congressional redistricting litigation). Under the law, the political parties must hold primaries under whatever plan is adopted by the State or the appropriate court, and as long as the state defendants are included, the political parties need not be named as defendants. This is not a proper basis for a motion to dismiss.[7]

V.

As all parties agree, any plan adopted by this Court must be precleared under Section 5 of the Voting Rights Act. However, the intervenors argue that preclearance must be obtained before this Court even holds hearings. That is simply not correct, and the intervenors cite no case law mandating such a requirement. Indeed, all of the case law demonstrates the contrary. *See, Hathorn v. Lovorn,* 457 U.S. at 269-270 (United States Supreme Court holds that where a chancery court orders a new election plan implemented, the change must be precleared, but

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[7] This is discussed more at pages 2-3 of our response to the intervenors' motion to dismiss.

the Court never suggested that preclearance should have been obtained before the chancery court held hearings); *Adams County Election Commission v. Sanders*, 586 So.2d at 830 (same).[8] Redistricting litigation has proceeded in a number of state courts in other states that are covered by Section 5 of the Voting Rights Act, but no court has ever held that preclearance must be obtained before the state court holds hearings.

For all of these reasons, as well as those stated in our prior responses, the motions to dismiss should be denied.

Respectfully submitted,

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Counsel for Plaintiffs

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[8] This is discussed more fully at page 3 of our response to the intervenors' motion to dismiss

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered by fax and by first class mail to the following:

T. Hunt Cole, Jr.
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Grant Fox
P.O. Box 797
Tupelo, MS 38802-0797

F. Keith Ball
P.O. Box 954
Louisville, MS 39339

This 3rd day of December, 2001.

/s/ Robert B. McDuff
Counsel for Plaintiffs

APPENDIX 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. 3:01CV855WS

ERIC CLARK, ET AL. DEFENDANTS

COURT REPORTER'S TRANSCRIPT OF HEARING

BEFORE THE THREE-JUDGE PANEL CONSISTING OF:

HONORABLE E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

HONORABLE DAVID C. BRAMLETTE, III
UNITED STATES DISTRICT JUDGE

Jackson, Mississippi
January 16, 2002

APPEARANCES:

MR. ROBERT B. MCDUFF
MR. CARLTON W. REEVES

Representing the Intervenors

MR. MICHAEL B. WALLACE
MR. ARTHUR F. JERNIGAN, JR.
MR. F. KEITH BALL
MR. GRANT M. FOX
MR. CHRISTOPHER R. SHAW
MS. STACY O'NEILL

Representing the Plaintiffs

* * *

[p. 11] MR. MCDUFF: Thank you, Your Honor. Let me mention a couple of sort of general things and then get down to the specifics. One thing that would affect the time involved is whether at large elections are on the table. Our view is that at large elections are not permissible, particularly where the court has the opportunity and the time to draw a plan. If there were something the court was actively considering, we would need to put on evidence, I believe, to bolster our contingent or to refute any contrary contention that –

JUDGE JOLLY: I think I can tell you that that is a reasonably remote – I mean we are assuming, and, in fact, the reason that we are acting as we are is a determination to make sure that the election under one plan or another begins the process on March 1st. And that assumes that there will be districts drawn.

MR. MCDUFF: Okay, very well. That being the case, it would be unnecessary for us to present evidence regarding whether at large elections would violate Section 2 of the Voting Rights Act.

* * *

APPENDIX 5

U.S. Department of Justice

Civil Rights Division

JDR:RSB:TCH:RJD:nj
DJ 166-012-3
2001-4084

Voting Section
950 Pennsylvania Avenue, Room 7254
Washington, D.C. 20530

April 1, 2002

The Honorable Michael Moore
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to the Orders dated December 21 and 31, 2001, of the Chancery Court of Hinds County in *Branch v. Clark* adopting a 2001 congressional redistricting plan and the Order dated December 13, 2001, of the Supreme Court of Mississippi in *In Re Mauldin*, authorizing the Chancery Court to adopt a congressional redistricting plan, for the State of Mississippi, submitted to the Attorney Gneral pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2002, request for additional information on February 19-20, 2002.

We understand that the federal court in *Smith v. Clark* (S.D. Miss.) has found the changes effected by the Orders in *Branch v. Clark*, and *In Re Mauldin*, to be unconstitutional

under Article I, Section 4 of the United States Constitution, and has enjoined their implementation on that basis. We further understand that applications for an emergency stay have been sought and denied by the United States Supreme Court, but that an appeal remains pending. Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission now. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.22(a), 51.35). If the injunction against implementation of these changes is lifted, upon notification, the Attorney General will again consider these changes for preclearance unless the state notifies us of its intent to alter them. Any documentation previously provided need not be resubmitted. Refer to File No. 2001-4084 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Joseph D. Rich
Joseph D. Rich
Chief, Voting Section

APPENDIX 6

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER,
Plaintiffs,

vs. **No. 3:01cv855**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,
Defendants,

and

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,
Intervenors.

INTERVENORS' MOTION TO DECLARE THAT THE STATE COURT PLAN IS NOW PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT

[filed April 23, 2002]

This Court's February 26 injunction against the state court congressional redistricting plan was based on (1) the holding

that preclearance under Section 5 of the Voting Rights Act had not been obtained, and (2) the additional holding that even if preclearance is obtained, the courts of Mississippi have no power to act in matters of congressional redistricting in light of Article I, § 4 of the United States Constitution. Because of intervening events, we contend that the plan has now unquestionably been precleared. Accordingly, we move this Court to declare that it is precleared. Although the injunction will remain in place in light of the constitutional holding, a holding that the plan has been precleared will narrow the issues in the pending appeal before the United States Supreme Court.

Section 5 provides that a redistricting plan is precleared if "the [United States] Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. 42 U.S.C. § 1973c. A second sixty-day review period under Section 5 has now passed without an objection by the Attorney General. While the Department of Justice claimed in an April 1, 2002 letter that this Court's federal constitutional ruling renders the state court plan incapable of administration, and therefore "not ripe" for Section 5 review, the language of Section 5 does not allow for postponement of the sixty day period on that ground. Thus, the plan has been precleared.

This Court's February 26 order specifically retained jurisdiction of this case. Although the injunction has been appealed to the Supreme Court, this Court has the authority to resolve matters that arise in the interim. At present, the injunction is based both upon the constitutional ruling and the Section 5 ruling. We contend that intervening events require the Section 5 ruling to be vacated. This Court should promptly address the matter in the first instance. Although the Supreme Court appeal will remain in place irrespective of this Court's decision on the matter, that decision will affect the scope of the appeal. For example, if this Court declares the plan now

precleared, the Supreme Court likely will not need to address any of the additional Section 5 issues that presently are raised in the appeal.

In further support of this motion, the following is submitted:

On February 14, 2002, the United States Department of Justice requested more information regarding the State's December 26, 2001 submission under Section 5. The Mississippi Attorney General submitted that information on February 19, 2002. The United States Department of Justice contended that this request restarted the original sixty day statutory review period under Section 5 once the additional information was submitted. Over the intervenors' objection, this Court agreed. On February 26, 2002, with no decision having been made by the United States Attorney General under Section 5, this Court enjoined implementation of the state court congressional redistricting plan that had been included in the December 26 submission.

Even if this Court was correct that the February 14 request for more information invalidated the original sixty day statutory review period, the review period was restarted on February 19 when the Mississippi Attorney General submitted the additional information. That period expired on or before April 22, 2002, which was the first weekday after the sixtieth day after February 19. Under the terms of Section 5, the state court plan "may be enforced" if "the Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. Because the Attorney General has not interposed an objection on or before April 22, the plan has been precleared.

Other than the February 14 request for more information,

the only formal communication from the United States Department of Justice to the Mississippi Attorney General regarding the Section 5 submission came on April 1, 2002. In a letter dated that day, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the April 1 letter also stated that, in light of this Court's Article I, § 4 holding, "it would be inappropriate for the Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." (A copy of the April 1 letter is attached as Exhibit 1. A copy of the February 19 submission of the additional information is attached as Exhibit 2).

However, this Court's Article I, § 4 holding does not postpone the statutory sixty-day review period. Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, through its courts, has "enact[ed] or seek[s] to administer"the state court redistricting plan. This is reflected in the Mississippi Supreme Court's December 13, 2001 ruling and the December 21 opinion and order of the Chancery Court of Hinds County.

This Court's holding to the effect that the Mississippi courts do not have that power as a matter of federal constitutional law does not change the fact that the state courts have "enact[ed]" or "seek to administer" the state court plan.

Although the April 1 Department of Justice stated that the plan is not "presently capable of administration" because of this Court's constitutional injunction, Section 5 does not require that the plan be "capable of administration." It simply requires that the state authorities "enact or seek to administer" the plan. Once the plan is submitted, the statutory sixty day review period begins. Nothing in the statute allows the Attorney General to postpone the sixty day period simply because a federal court enjoins the plan on federal constitutional grounds.

In *Morris v. Gressette*, 432 U.S. 491 (1977), the Supreme Court noted that under Section 5, a covered jurisdiction may preclear a voting change by obtaining a declaratory judgment from the Federal District Court for the District of Columbia or, alternatively, "may submit [the] change . . . to the Attorney General and subsequently may enforce the change if 'the Attorney General has not interposed an objection within sixty days after such submission.'" *Id.* at 502. Under this alternative method, said the Court, "compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the Attorney General." *Id.* The Court added:

> We think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to

> interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

Id. at 504. Also, the Court pointed out that "the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation." *Id.* at 505.

Thus, the Supreme Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review. At the same time, the Court said review by the Attorney General must provide an "expeditious" means of preclearance and may not be "'dragg[ed] out' . . . beyond the period specified in the statute." This strongly indicates that a constitutional injunction does not postpone the statutory sixty day review period.

The need for a prompt decision on a Section 5 submission, independent of any constitutional injunction, is illustrated by the fact that "States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993). If a federal court enjoins a redistricting plan on constitutional grounds, the injunction is subject to being vacated on appeal, perhaps through emergency review. However, if the United States Attorney General can postpone the sixty day period when an injunction is entered, the covered jurisdiction will be unable to implement the plan promptly even if the injunction is vacated. The jurisdiction will be required to await renewal and completion of the interrupted Section 5 review process. The language of Section 5 does not allow for this sort of delay.

Of course, if the Attorney General is unable — as we

contend — to postpone the sixty period, there is the possibility that the completion of the Section 5 review process will have been in vain if the constitutional injunction is not lifted on appeal. But if Congress had believed this to be a problem, it would have written the statute to stop the sixty day period when such an injunction was issued. It did not do so, and the statutory terms of Section 5 do not allow for suspension of the review period on this basis.

In light of the foregoing, this motion should be granted.

Respectfully submitted,

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Counsel for Intervenors

[certificate omitted in printing]

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH,
SHIRLEY HALL, AND
GENE WALKER **PLAINTIFFS**

V. **CIVIL ACTION NO. 3:01-CV-855WS**

ERIC CLARK, Secretary of State of Mississippi, MIKE MOORE, Attorney General for the State of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPBULICAN EXECUTIVE COMMITTEE; AND MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE DEFENDANTS

AND

BEARTRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL **INTERVENORS**

ORDER

[filed June 3,2002]

IT IS ORDERED that the Intervenors' Motion to Declare that the State Court Plan is Now Precleared Under Section 5 of the Voting Rights Act is DENIED.

SO ORDERED, this 3d day of June, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

/s/ David C. Bramlette
DAVID C. BRAMLETTE
United States District Judge

No. 01-1596

Supreme Court, U.S.
FILED
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In The Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

On Cross-Appeal From The United States District Court For The Southern District Of Mississippi

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QUESTION PRESENTED

Whether, as its plain language declares, 2 U.S.C. § 2a(c)(5) requires a State whose representation in Congress has been reduced after a census to elect its Representatives "from the State at large" "[u]ntil a State is redistricted in the manner provided by the law thereof."

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OPINIONS BELOW

The judgment and opinion of the District Court have been reproduced in the Appendix to the Jurisdictional Statement filed in conjunction with the appeal in *Branch v. Smith*, No. 01-1437, which has been consolidated with this appeal for argument. The final judgment of February 26, 2002, is reproduced beginning at App. 1a.[1] The Court's several opinions are reproduced in the Appendix as follows: February 26, 2002, App. 4a; February 19, 2002, App. 25a; February 4, 2002, App. 62a; January 15, 2002, App. 90a; December 5, 2001, App. 107a. The five opinions may be found in chronological order at *Smith v. Clark*, 189 F. Supp. 2d 502 (S.D. Miss. 2001), 189 F. Supp. 2d 503, 189 F. Supp. 2d 512, 189 F. Supp. 2d 529, and 189 F. Supp. 2d 548 (S.D. Miss. 2002).

JURISDICTION

The judgment of the three-judge District Court was entered on February 26, 2002, App. 1a, and the intervening defendants filed a timely notice of appeal that same day. App. 239a. The Jurisdictional Statement in No. 01-1437 was filed with this Court on March 28, 2002, and placed on the docket that same day. The Jurisdictional Statement on conditional cross-appeal in No. 01-1596 was filed by plaintiffs and defendant Mississippi Republican

[1] The citation "App." refers to the Appendix to the Jurisdictional Statement in No. 01-1437. The citation "J.App." refers to the Joint Appendix prepared for both of these consolidated appeals pursuant to this Court's Rule 26.

Executive Committee on April 26, 2002, within the thirty days permitted by this Court's Rule 18.4. It was placed on the docket on April 29, 2002. On June 10, 2002, this Court noted probable jurisdiction in both appeals and consolidated them for oral argument. Jurisdiction is appropriate under 28 U.S.C. § 1253.

STATUTES

2 U.S.C. § 2a provides in pertinent part:

> (c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2c provides:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its

Representatives at Large to the Ninety-first Congress).

STATEMENT OF THE CASE

Mississippi is currently represented by five Members of the United States House of Representatives. Under the reapportionment occasioned by the 2000 census, Mississippi's delegation was reduced to four Representatives. Consistent with the prior apportionment, Mississippi law divides the state into five districts. Miss. Code Ann. § 23-15-1037 (Rev. 2001). The Mississippi Legislature was unable to agree on a redistricting plan after the 2000 census. The Chancery Court of the First Judicial District of Hinds County ordered into effect a new plan drafted by plaintiffs, who intervened as defendants before the District Court in this action, but the District Court's final judgment enjoined state election officials from enforcing that plan. App. 1a-2a. Instead, the District Court ordered into effect a plan, which it drafted, to divide the State into four new districts. App. 2a.

Plaintiffs in this action are three Mississippi voters. On November 1, 2001, they filed their complaint with the District Court, seeking to enjoin enforcement of the old five-district plan and to require at-large elections under 2 U.S.C. § 2a(c)(5) and Miss. Code Ann. § 23-15-1039 (Rev. 2001). They named as defendants the three elected state officers who make up the State Board of Election Commissioners, *see* Miss. Code Ann. § 23-15-211(1) (Rev. 2001), as well as the Mississippi Republican Executive Committee and Mississippi Democratic Executive Committee, who administer the Mississippi statutes governing nominations to Congress by primary. *See, e.g.*, Miss. Code Ann.

§§ 23-15-299, -331, -923, and -963 (Rev. 2001). Plaintiffs asked in the alternative that the District Court devise its own redistricting plan consistent with federal law.

The next day, November 2, 2001, process was served on the three elected state officials in a separate action filed by seven voters in the Chancery Court of the First Judicial District of Hinds County, seeking the imposition of a redistricting plan as a matter of state law. Those same voters were allowed to intervene as defendants before the District Court by order of December 5, 2001. App. 107a. On December 13, 2001, the Supreme Court of Mississippi entered an order in *In re Mauldin*, No. 2001-M-01891 (Miss. Dec. 13, 2001), authorizing the Chancery Court to begin trial the next day and to place a congressional redistricting plan into effect. App. 110a. The following Monday, December 17, 2001, plaintiffs moved to amend their complaint, seeking to enjoin the enforcement of the order entered in *In re Mauldin* and any redistricting plan to be entered by the Chancery Court for failure to obtain the necessary approval under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. The District Court granted leave to amend by order entered January 7, 2002.

The intervening defendants never answered the amended complaint. However, in their response to the motion for leave to amend, they argued that the at-large election requirement of 2 U.S.C. § 2a(c)(5) had been repealed by implication in 1967, when Congress adopted 2 U.S.C. § 2c, mandating that Representatives be elected from districts. In its order of January 15, 2002, the District Court acknowledged that plaintiffs had sought enforcement of the at-large election statutes. App. 95a. However, the Court announced from the bench the next day that it intended to draw new districts rather than to

order the election of Representatives at large. J.App. 27. The District Court's final judgment imposed a redistricting plan devised by the Court. App. 1a. At no point did the District Court explain why plaintiffs were not entitled to enforcement of the at-large election statutes.

SUMMARY OF THE ARGUMENT

1. The question presented by this appeal is properly before this Court. In both their complaint and their amended complaint, plaintiffs asked the District Court to order the election of Representatives at large, as required by 2 U.S.C. § 2a(c)(5). The Court announced from the bench, without explanation, that it would not do so. J.App. 27a.

2. After extensive recent experience with the failure of States to redistrict following a new apportionment, Congress adopted § 2a(c) in 1941 to deal with that eventuality. In a series of cases during the previous decade, this Court had approved judgments requiring States to elect added Representatives at large, and to elect all Representatives at large when losing representation. In 1941 Congress wrote precisely that course of action into law. States followed those dictates with regularity over the ensuing quarter century.

In 1967 Congress adopted 2 U.S.C. § 2c, which generally requires the election of Representatives by districts; the new statute, however, made no mention of § 2a(c). Although one District Court found the 1967 statute to have repealed the 1941 statute by implication, the difficult standard set by this Court has not been met: "[W]hen two statutes are capable of co-existence, it is the duty of the

courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

On its face, § 2c does not anticipate enforcement by courts; in requiring districts to be "established by law," it directs its force to state legislatures, which adopt laws. In the face of an earlier statute requiring districts to be established, this Court in *Smiley v. Holm*, 285 U.S. 355 (1932), required elections to be held at large when the Minnesota Legislature failed to act. Section 2a(c) codifies the result reached by this Court. Far from being inconsistent, § 2a(c) provides the remedy for the violation of § 2c by legislative inaction.

Neither is there any evidence of a clear congressional intention to repeal § 2a(c). To the contrary, earlier in 1967 Congress considered legislation which would have explicitly repealed the existing version of § 2a(c). After the repealer was excised in conference, the House defeated a motion to restore it, before the Senate defeated the conference report altogether. This Court has recognized that contemporaneously rejected proposals may shed light on the meaning of statutes actually adopted by Congress. This rule has special force with regard to implied repeals; where Congress has rejected an effort at explicit repeal, it will not be held to have repealed an existing statute implicitly. Because Congress explicitly refused to repeal § 2a(c), it should not be held to have implicitly done so in adopting § 2c.

3. There is no basis for the suggestion that the adoption of § 2c leaves § 2a(c) to operate only in cases where a court lacks time to perform its own redistricting. In adopting § 2a(c) in 1941, Congress would not have

expected courts to play any role in redistricting. The instructions of the 1941 statute are directed only to state election officials. Courts should resist the invitation of political actors to mediate their redistricting disputes; instead, they should implement § 2a(c) precisely as it reads. In previous circumstances where courts have ordered Representatives to be elected at large, legislatures have promptly proceeded to discharge their duty to adopt redistricting plans.

4. Finally, compliance with § 2a(c)(5) does not violate the Voting Rights Act. This Court has already held that compliance with federal law does not require preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. *Young v. Fordice*, 520 U.S. 273 (1997). Nor is there any textual suggestion in § 2 of the Voting Rights Act, 42 U.S.C. § 1973, that its strictures apply to compliance with acts of Congress. Of course, any discretionary decisions made by Mississippi in implementing § 2a(c)(5) must be consistent with the Voting Rights Act. If Mississippi fails to make the decisions necessary for implementation of the statute, it can be expected that the District Court will implement election procedures consistent with the Voting Rights Act and other provisions of federal law.

ARGUMENT

I. THE CLAIM FOR AT-LARGE ELECTIONS WAS PRESSED BY PLAINTIFFS AND PASSED ON BY THE DISTRICT COURT.

In their conditional motion to affirm, intervenors contended that plaintiffs had waived their claim for at-large elections, even though intervenors admitted that

plaintiffs requested such relief in their complaint and their amended complaint. Before the trial ever took place, the District Court announced from the bench that it was not planning to order that Representatives be elected at large. J.App. 27. The Court gave no reasons and sought no argument. The parties proceeded to present their evidence on the understanding that the Court intended to develop its own redistricting plan.

It was in this context that the District Court issued its order of February 4, 2002, announcing its proposed redistricting plan. App. 62a-63a. That order instructed the parties to make any objections, comments, or suggestions with regard to the plan itself; it did not invite the parties to ask the Court to reconsider its decision to devise a plan in the first place. The plain purpose of the order was to give the parties an opportunity to be heard on a plan they had not previously seen, not to invite them to revisit a decision that had already been made.

Under these circumstances, the question presented by the cross-appeal is properly before this Court. As this Court has explained, "The standard we previously have employed is that we will not review a question not pressed *or* passed on by the courts below." *United States v. Williams*, 504 U.S. 36, 42 (1992), quoting *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987) (O'Connor, J., dissenting) (emphasis in original; citations omitted). Indeed, the rule "permit[s] review of an issue not pressed so long as it has been passed upon." *United States v. Williams*, 504 U.S. at 41. "It suffices for our purposes that the court below passed on the issue presented, particularly where the issue is, we believe, in a state of evolving definition and uncertainty, and one of importance to the administration

of federal law." *Id.*, at 41-42, quoting *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

The method of election of Members of the House of Representatives is obviously one of great importance in federal law. The applicability of § 2a(c)(5) in these circumstances was plainly passed upon by the District Court; intervenors do not contend to the contrary. Moreover, the issue was pressed upon the District Court by plaintiffs, as intervenors admit; their only complaint is that plaintiffs did not continue to press the issue after the District Court had already ruled upon it. Because the applicability of § 2a(c)(5) was both pressed by plaintiffs and passed upon by the District Court, it is properly before this Court for review.[2]

II. SECTION 2a(c) HAS NEVER BEEN REPEALED.

There is no ambiguity in § 2a(c)(5). On its face, it plainly requires the election of Representatives at large where, as here, a State has lost representation but has failed to redistrict. Against the plain language of the statute, intervenors set the contention that the adoption of § 2c in 1967 implicitly repealed the earlier statute. Both the text and the history of the two statutes belie any such suggestion.

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[2] Nothing in the District Court's order of February 4 indicates that the Court, by inviting objections, intended to terminate plaintiffs' right of review of decisions previously made. In any event, intervenors offer no authority to suggest that, even if intended, the District Court's order could have that effect. This Court's power of review is governed by its practices as explained in *United States v. Williams*, not by any order the District Court might enter.

The adoption of § 2a(c) in 1941, Act of November 15, 1941, c.470, § 1, 55 Stat. 761, followed long experience with the failure of elected officials to complete the reapportionment and redistricting process after a census. As this Court recounted the history in *Wood v. Broom*, 287 U.S. 1, 6 (1932) *rev'g*, 1 F. Supp. 134 (S.D. Miss. 1932), Congress had traditionally adopted a new reapportionment by statute after each census. However, Congress failed to pass a new reapportionment after the Fourteenth Census in 1920. For the Fifteenth Census, Congress delegated to the President the responsibility of preparing a new reapportionment after each census, subject to displacement by a subsequent Act of Congress. Act of June 18, 1929, c.28, § 22, 46 Stat. 26. *See generally Utah v. Evans*, ___ U.S. ___, 122 S.Ct. 2191, 2198 (2002) (discussing procedures under statute). It was this provision which Congress amended in 1941.

The reapportionment after the 1930 census led to extensive redistricting disputes in the States. In *Wood*, this Court reversed a judgment enjoining enforcement of Mississippi's redistricting statute; the Court found that statutory requirements of compactness and substantially equal population adopted after the census of 1910 had not been carried forward into the 1929 Act. 287 U.S. at 6-7. In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court upheld the validity of a veto by the Governor of Minnesota of a redistricting plan adopted by its Legislature. Because Minnesota had lost seats in the new reapportionment, this Court declared that, "unless and until new districts are created, all Representatives allotted to the state must be elected by the state at large." *Id.*, at 374-75. In *Carroll v. Becker*, 285 U.S. 380 (1932), this Court affirmed a judgment compelling the same result in Missouri, which had lost three

seats. In New York, which gained two seats, this Court affirmed a judgment requiring the old districts to be used and the two new Representatives to be elected at large. *Koenig v. Flynn*, 285 U.S. 375 (1932).

Congress would undoubtedly have been aware of this history when it amended the 1929 Act promptly after the 1940 census. Following the pattern set by this Court in *Smiley*, *Carroll*, and *Koenig*, it explicitly specified the method of election to be used "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment." The second clause of § 2a(c), which provides that, "if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large," was implemented immediately after its adoption. New Mexico acquired its second Representative after the 1940 census, but it elected both Representatives at large. *See Norton v. Campbell*, 359 F.2d 608, 609 (10th Cir. 1966). The Tenth Circuit expressly noted that such a procedure is required by § 2a(c)(2) until the redistricting is accomplished. *Id.*, at 609-10. The Court went on to hold that neither the statute or the Constitution requires that a State be divided into districts for the purpose of electing Representatives. *Id.*, at 610-12. The New Mexico course was followed by five other States after the 1960 census, when Connecticut, Maryland, Michigan, Ohio and Texas each elected one Representative at large. *See* A. HACKER, CONGRESSIONAL DISTRICTING: THE ISSUE OF EQUAL REPRESENTATION 92-93 (1963).

At issue in this case is the fifth clause of § 2a(c), which declares that, "if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they

shall be elected from the State at large." That clause was implemented in Alabama when its delegation was reduced from nine Members to eight after the census of 1960. An act of the Alabama Legislature requiring all Representatives to be elected at large was held by a three-judge district court "to be in strict accord with" § 2a(c)(5). *Alsup v. Mayhall*, 208 F. Supp. 715, 716 (S.D. Ala. 1962). Two years later, when Alabama's peculiar method of nomination[3] was held unconstitutional in light of this Court's decisions in *Baker v. Carr*, 369 U.S. 186 (1962), and *Wesberry v. Sanders*, 376 U.S. 1 (1964), the three-judge district court nevertheless found it "entirely valid and legal to choose congressional representatives as a group on a statewide basis." *Moore v. Moore*, 229 F. Supp. 435, 439 (S.D. Ala. 1964).

The upheaval wrought by *Baker v. Carr* and *Wesberry v. Sanders* caused Congress to turn again to the manner of election of Representatives in 1967. Congress did not amend the 1929 Act, but adopted a new provision, now codified as 2 U.S.C. § 2c, providing that, in each State with more than one Representative, "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." Act of December 14, 1967, Pub. L. 90-196, 81 Stat. 581. The Act bears the unusual title, "An Act for the Relief of Dr. Ricardo Vallejo Samala and to Provide for Congressional Redistricting," because it originated in the House of

[3] The Legislature had provided that the nine old districts would nominate candidates who would compete in a statewide run-off, in which the top eight participants would be nominated for the statewide general election. *See Alsup*, 208 F. Supp. at 714.

Representatives as a private relief bill. The language now codified as § 2c was adopted after a brief discussion on the floor of the Senate. 113 Cong. Rec. 31,718-20 (1967). No committee report explaining the legislation was prepared in either House.

Although § 2c makes no mention of § 2a(c), the District Court in *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 926-27 (W.D. Mo.), *aff'd mem.*, 456 U.S. 966 (1982), concluded that the 1967 statute repealed the 1941 statute by implication.[4] Even though § 2c makes no mention of courts, the *Shayer* Court relied on the floor debate to conclude that it would be "mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by the State legislatures or by a Federal court." 541 F. Supp. at 927, quoting 113 Cong. Rec. 31,720 (Sen. Bayh). Acknowledging that repeals by implication are not favored, the Court concluded, "Here, the plain language of section 2c is inconsistent with section 2a(c)(5), warranting

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[4] This Court has held that a summary affirmance merely approves the judgment of the court below, not its reasoning. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). A summary affirmance does no more than to "reject the specific challenges presented in the statement of jurisdiction." *Id.* The specific challenges made in this Court to the judgment in *Shayer* were as follows:

1. whether the district court erred in view of the principles of comity and federalism, in adopting its own plan instead of adopting a plan considered by the Missouri legislature; and
2. whether *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225 (1969) should be overruled.

Schatzle v. Kirkpatrick, No. 81-1731, Jurisdictional Statement at i. Thus, this Court did not address the conclusion of the District Court in *Shayer* that § 2a(c) had been repealed by implication.

a finding of repeal by implication." 541 F. Supp. at 927. That conclusion was rejected just weeks later by another District Court, which concluded that "these two statutes are not necessarily inconsistent." *Carstens v. Lamm*, 543 F. Supp. 68, 77 (D. Colo. 1982).

This Court has repeatedly stated that "repeals by implication are not favored," *Universal Interpretive Shuttle Corp. v. Washington Metropolitan Area Transit Comm'n*, 393 U.S. 186, 193 (1968). Here, § 2c establishes the general principle that Representatives should be elected from districts, but § 2a(c) addresses the specific consequences of legislative inaction. This Court has explained the rule to be applied in such situations:

> "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute governing a more generalized spectrum," *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 143 (1976), unless the latter statute "'expressly contradict[s] the original act'" or unless such a construction "'is absolutely necessary . . . in order that [the] words [of the later statute] shall have any meaning at all.'" *Ibid.* (quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the

> contrary, to regard each as effective." *Supra*, *Morton v. Mancari*, 417 U.S. [535,] 551 [(1974)].

Traynor v. Turnage, 485 U.S. 535, 547-48 (1988).[5]

It cannot be said that the requirement of § 2c that "Representatives shall be elected only from districts" expressly contradicts § 2a(c)(5). Section 2c declares that elections shall be held "from districts so established," which obviously refers to the requirement earlier in the same sentence that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." The words "by law," given their ordinary meaning, would refer to legislation,[6] not to any form of litigation, particularly in light of the fact that Article I, § 4 of the Constitution

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[5] As one scholar described the principle set down in *Radzanower*, "The Court will reconcile the two statutes in order to give maximum effect to the policy of each, and to give greater effect to the statute that more clearly focuses on the issue in the case." Eskridge, *Public Values in Statutory Interpretation*, 137 U.Pa.L.Rev. 1007, 1040-41 (1989). Citing this article, this Court has acknowledged the kinship between the presumption against implied repeals and other clear statement rules of statutory construction. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109 (1991). In adopting § 2c Congress made no statement, much less a clear one, about the continuing vitality of § 2a(c).

[6] Interpreting the phrase "by law" in another statute, the Ninth Circuit said, "The reference to authorization 'by law' connects this statute assigning authority to the Attorney General, with the statute quoted above, assigning duties directly 'by law' to United States Attorneys." *Thomas v. I.N.S.*, 35 F.3d 1332, 1339 (9th Cir. 1994), construing 28 U.S.C. §§ 515(a), 547.

commits redistricting authority to state legislatures.[7] No such districts have been "so established" by legislation in Mississippi, but surely Congress did not intend to prohibit elections altogether in those circumstances.

Seventy years ago in *Smiley v. Holm*, *supra*, this Court found that statutory language requiring Representatives to be elected by districts did not bar the conduct of elections at large. The statute authorizing the Thirteenth Census provided that Representatives "shall be elected by districts." 285 U.S. at 362 n.1, quoting Act of August 8, 1911, c.5, § 3, 37 Stat. 13. Notwithstanding this apparently mandatory language, § 4 of the same statute provided that any new Representatives should be elected at large "until such State shall be redistricted in the manner provided by the laws thereof," *id.*, just as § 2a(c)(2) continues to provide today.[8] Even though the statute contained no express

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[7] The Mississippi Legislature has provided "by law" for the resolution of this dilemma in a manner entirely consistent with § 2a(c)(5):

> Should an election of representatives in Congress occur after the number of representatives to which the state is entitled shall be changed, in consequence of a new apportionment being made by Congress, and before the districts shall have been changed to conform to the new apportionment, representatives shall be chosen as follows: . . . if the number of representatives shall be diminished, then the whole number shall be chosen by the electors of the state at large.

Miss. Code Ann. § 23-15-1039 (Rev. 2001).

[8] Because this Court found no inconsistency with the 1929 statute, it decided *Smiley* on the assumption that § 3 of the 1911 statute remained in effect. *Id.*, at 374-75. Not until the next Term did this Court rule that §§ 3 and 4 of the 1911 statute "expired by their own limitation," because they applied by their terms only to the Thirteenth Census. *Wood v. Broom*, *supra*, 287 U.S. at 7.

provision concerning the loss of seats, the Court held that Minnesota, which had failed to redistrict after losing a seat, would hold elections at large "in order to afford the representation to which the state is constitutionally entitled, and the general provisions of the act of 1911 cannot be regarded as intended to have a different import." 285 U.S. at 375. Just as the 1911 statute requiring districts was not inconsistent with at-large elections, so § 2c is not inconsistent with § 2a(c)(5), which requires exactly the remedy mandated by this Court in *Smiley*.

Indeed, § 2c and § 2a(c) are plainly "capable of coexistence." *Morton v. Mancari*, *supra*, 417 U.S. at 551. On its face, § 2c is addressed, not to the courts, but solely to the lawmaking authority "[i]n each State entitled . . . to more than one Representative." The statute instructs each such authority that "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled." Section 2c does not say what shall happen when, as in Mississippi, the lawmaking authority fails to establish those districts by law.

That issue is expressly addressed by § 2a(c), which applies "[u]ntil a State is redistricted in the manner provided by the law thereof." Some of those instructions may now be problematical; the requirement in § 2a(c)(1) that the old districts should continue to be used where there is no change in the size of the delegation will almost certainly conflict, because of population shifts, with the requirement in *Wesberry* of population equality. However, there is no impediment to the enforcement of § 2a(c)(5), because *Wesberry* expressly declares that the Constitution is satisfied "when Representatives are chosen as a group

on a statewide basis."[9] Thus, far from conflicting with § 2c, § 2a(c)(5) constitutes the remedy for its violation.

Here, the presumption against implied repeal is reinforced by the fact that, earlier in 1967, Congress considered four different versions of a bill, H.R. 2508, 90th Cong. (1967), the first three of which repealed the existing version of § 2a(c) and replaced it with different language:

(1) the version passed by the House in April, *see* H. Rep. No. 90-191 (1967); 113 Cong. Rec. 11,089 (1967);

(2) the version passed by the Senate in June, after adopting an amendment proposed by Senator Kennedy, *see* S. Rep. No. 90-291 (1967); 113 Cong. Rec. 14,779 (1967) (text of amendment); 113 Cong. Rec. 15,244 (1967) (passage of bill);

(3) the version proposed by the conference committee in June, *see* H. Rep. No. 90-435 (1967), but recommitted to conference by the House, *see* 113 Cong. Rec. 17,738 (1967).

After recommittal, the conference committee reported a fourth version, which abandoned any amendment to § 2a(c), providing instead for temporary measures applicable only to the elections of 1968 and 1970. *See* H. Rep. No. 90-795 (1967).[10] An effort to reinstate the permanent

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[9] Although § 5 of the Voting Rights Act in some circumstances has been held to invalidate state laws requiring election from multimember districts, *Thornburg v. Gingles*, 478 U.S. 30 (1986), § 5 on its face has no application to acts of Congress.

[10] The author of the conference report, Chairman Celler of the Judiciary Committee, was thoroughly familiar with the origin and effect of § 2a(c). He had been working for two decades to restore

(Continued on following page)

amendment to § 2a(c) was soundly defeated, *see* 113 Cong. Rec. 30,250 (1967), before passage of the conference report. *See* 113 Cong. Rec. 30,251 (1967). The Senate, however, rejected the new version. *See* 113 Cong. Rec. 31,712 (1967).

A short time later, on the same day that the Senate defeated H.R. 2508, Sen. Baker proposed the language that became § 2c, but did *not* replace the language in § 2a(c). 113 Cong. Rec. 31,718-20 (1967). Further, the Senate adopted its amendment in lieu of a very similar amendment, proposed by Sen. Bayh, that omitted the "by law" restriction discussed above. *See* 113 Cong. Rec. 31,718 (1967) (proposed language requiring that "there shall be established a number of districts" where statute now has "there shall be established *by law* a number of districts"). After the House added the parenthetical exception for Hawaii and New Mexico for the 1968 election, *see* 113 Cong. Rec. 34,038-39 (1967), the Senate approved the final version. *See* 113 Cong. Rec. 34,369-70 (1967).

This Court has repeatedly used contemporaneously-rejected proposals to illuminate the meaning of the text actually adopted. *See, e.g., Crosby v. National Foreign Trade Council*, 530 U.S. 363, 378 n.13 (2000) ("The fact that Congress repeatedly considered and rejected targeting a broader range of conduct lends additional support to our view."); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (relevant that Congress "squarely rejected proposals to give the FDA jurisdiction

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statutory standards to guide districting decisions. *See* Celler, *Congressional Apportionment – Past, Present, and Future*, 17 Law & Contemp. Prob. 268 (1952).

over tobacco"); *Thompson v. Thompson*, 484 U.S. 174, 183-85 (1988) (finding an "unusually clear indication that Congress did not intend the federal courts to play the enforcement role that petitioner urges" in the fact that "Congress considered and rejected [a similar] approach to the problem"). The importance of Congressional rejection takes on particular force when it concerns the repeal of an existing statute:

> The question of whether existing statutes should be continued in force or repealed is, under our system of government, one which is wholly within the domain of Congress. When the repeal of a highly significant law is urged upon that body and that repeal is rejected after careful consideration and discussion, the normal expectation is that courts will be faithful to their trust and abide by that decision. This is especially so where the fact of the controversy over repeal and the resolution of that controversy in Congress plainly appears in the formal legislative history of its proceedings. Indeed, not a single instance has been called to our attention in which a carefully considered and rejected proposal for repeal has been revived and adopted by this Court under the guise of "accommodation" or any other pseudonym.

Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 210 (1962) (footnote omitted). *See also United States v. Hansen*, 772 F.2d 940, 945 (D.C. Cir. 1985) (no implied repeal where the possibility of repeal "was explicitly brought to the attention of a House committee . . . and to the attention of the full House, in floor debate").

The tortured path of redistricting legislation through Congress in 1967 demonstrates why that body should be

entitled to expect that the presumption against implied repeals will be regularly followed. As the *Hansen* Court explained:

> A steady adherence to it is important, primarily to facilitate not the task of judging but the task of legislating. It is one of the fundamental ground rules under which laws are framed. Without it, determining the effect of a bill upon the body of preexisting law would be inordinately difficult, and the legislative process would become distorted by a sort of blind gamesmanship, in which Members of Congress vote for or against a particular measure according to their varying estimations of whether its implications will be held to suspend the effects of an earlier law that they favor or oppose.

Id., at 944. Scholars agree that the rule is important for effective congressional deliberations: "This principle is the product of a set of beliefs about the legislative process – in particular, a belief that Congress, focused as it usually is on a particular problem, should not be understood to have eliminated without specific consideration a program that was likely the product of sustained attention." Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv.L.Rev. 403, 475 (1989). Here, in its deliberations over H.R. 2508, Congress gave "specific consideration" to the repeal of § 2a(c) and declined to do so. In adopting § 2c, which made no mention of § 2a(c), Congress should not be deemed to have reversed course.

Because § 2c may be construed consistently with § 2a(c), and because there is no clearly expressed congressional intention to the contrary, this Court should conclude that the 1967 Act did not repeal the 1941 Act.

III. SECTION 2a(c) IS NOT LIMITED TO SITUATIONS WHERE A COURT LACKS TIME TO ACT.

Rejecting the conclusion in *Shayer* that § 2c and § 2a(c) are necessarily inconsistent, the District Court in *Carstens* perceived only a limited role for the at-large statute:

> Section 2c prohibits a legislature or court from deliberately designing a redistricting plan which would elect at-large representatives. Arguably, Congress did not repeal Section 2a(c)(2) because they did not want to leave a state without a remedy in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan. In this very limited circumstance, we believe that Section 2a(c)(2) provides emergency statutory relief from an otherwise unconstitutional situation.

543 F. Supp. at 77-78 (footnote omitted).[11]

The *Carstens* Court gave no explanation for its conclusion that § 2c has any effect upon a court. However, the assumption that the statutory scheme is addressed to courts as well as legislatures was central to its analysis. The Court's discussion concluded, "There is nothing in the language of Section 2a(c)(2) which indicates that Congress intended to bar the federal courts from providing timely

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[11] The second clause of § 2a(c) applies where a state has increased its representation; until redistricting is completed, the new Representatives are to be elected at large.

assistance to the state in resolving a redistricting dispute." *Id.*, at 78. The Court assumed that Congress intended the federal courts to exercise power unless that power had been explicitly withdrawn.

Congress, however, could have entertained no such assumption in 1941, when it adopted § 2a(c). The Constitution in Article I, § 4 gives primary control over federal elections to the state legislatures, vesting supervisory authority in Congress, not the courts. In exercising that supervisory authority in 1929, Congress addressed § 2a(c) to legislatures and state election authorities, expecting them to execute its provisions. It was not intended as an emergency measure should the courts fail to act, because Congress would have had no reason to expect the courts to act.

Of course, by 1967, courts had begun to act, taking control of redistricting decisions after *Baker* and *Wesberry*. It would not have been unreasonable to expect that § 2c would give explicit directions to courts for resolving those controversies. However, no such intent can be discerned from the language itself. The statute tells States that districts should be "established by law," but it gives no direction to courts.[12] Certainly, nothing in § 2c modifies the explicit terms of § 2a(c). If the 1929 Act has not been

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[12] The *Carstens* Court quoted Senator Bayh's statement that § 2c was intended to bind federal courts, 543 F. Supp. at 77 n.23, but did not rely upon it to support its holding. This Court ordinarily will "give no weight to a single reference by a single Senator during floor debate in the Senate," *Bath Iron Works Corp. v. Director*, 506 U.S. 153, 166 (1993), particularly where the proposed construction "is in no way anchored in the text of the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994).

implicitly repealed, then it retains the same meaning it had in 1929. It is an instruction to state election authorities to elect Representatives at large under the circumstances now presented in Mississippi.

At least one judge has concluded that § 2a(c)(5) retains its full vitality even where a court has time to draw a redistricting plan. In *Alexander v. Taylor*, 2002 Ok. 59, ___ P.3d ___ (June 25, 2002), the Supreme Court of Oklahoma affirmed a redistricting plan fashioned by a trial court after the Oklahoma Legislature failed to redistrict following the loss of a Representative. In dissent, Justice Opala found that plaintiffs had suffered no legal injury from the Legislature's inaction because § 2a(c)(5) dictated the proper course of action. *Id.*, at ¶ 10 (Opala, J., dissenting).[13] Justice Opala described the contending parties as "manipulating the judiciary into filling a political vacuum with a judicially-created districting plan," *id.*, at ¶ 1 (Opala, J., dissenting), and concluded by describing the practical necessity of relying on the plain language of § 2a(c)(5):

> It is only when courts discipline the parties involved by refusing to function as a safety valve for political actors (who increasingly favor using the judiciary as a forum for resolving their disputes) that they will truly feel compelled to negotiate a solution on their own. The court has no

[13] The majority did not address the continued vitality of § 2a(c)(5), presumably because the issue had not been addressed by the parties. *Id.*, at ¶ 6 (Opala, J., dissenting).

> business cleaning up this political mess, and I retreat from any such enterprise.

Id., at ¶ 17 (Opala, J., dissenting).

The willingness of the District Court in this case to clean up the mess made by the Mississippi Legislature will discourage compromise in future disputes over redistricting. Here, as in Oklahoma, various parties on both sides of the political dispute apparently believed that they could obtain a better result if they were able to enlist the aid of a friendly court. This Court can spare future courts such ordeals and bring certainty to the law by requiring that § 2a(c)(5) be implemented exactly as Congress wrote it. Because, as Justice Opala observed, at-large elections are "likely unpalatable to all here involved," *id.*, at ¶ 5 (Opala, J., dissenting), the knowledge that the statute will be followed will serve as the strongest possible encouragement to political compromise.[14]

Indeed, history shows that at-large elections have led to exactly that result:

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[14] This is not to suggest that Congress in 1941 intended to create a private right of action to enforce § 2a(c). Rather, where a State's districting plan is invalidated on other grounds, a court should be careful that its remedial plan is consistent with relevant statutory provisions. In an earlier congressional redistricting case, this Court declared that adherence in remedial plans to standards set by § 5 of the Voting Rights Act "is a reasonable standard, at the very least as an equitable factor to take into account, if not as a statutory mandate." *Abrams v. Johnson*, 521 U.S. 74, 96 (1997). Here, by ordering the implementation of its own four-district plan, the District Court not only failed to take § 2a(c)(5) into account, but it positively forbade the State from complying with it.

> Four times large states have been required by court orders to elect their entire congressional delegations at large. This followed from the Supreme Court decisions in *Smiley v. Holm* and *Carroll v. Becker*, the Virginia court's decision in *Brown v. Saunders*, [159 Va. 28, 166 S.E. 105 (1932),] and the decision of a federal district court in *Hume v. Mahan* [, 1 F. Supp. 142 (E.D. Ky. 1932)]. In all four instances the states proceeded to elect their representatives at large, and the House seated each delegation without recorded objection. And in the three cases in which the decrees were final the legislatures redistricted before the next election.

Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv.L.Rev. 1057, 1087-88 (1958) (footnotes omitted).

This recent history would have been well known to Congress in 1941. Indeed, by adopting § 2a(c) after the political failures of the previous decade, Congress may well have intended to bring exactly such pressures to bear on state legislatures to make sure that they would carry out their responsibilities under Article I, § 4 of the Constitution. There is no reason for this Court to displace the judgment that Congress made six decades ago.

IV. COMPLIANCE WITH SECTION 2a(c)(5) DOES NOT VIOLATE THE VOTING RIGHTS ACT.

Intervenors contend that the election of four Representatives at large in Mississippi would violate both § 2 and § 5 of the Voting Rights Act, 42 U.S.C. §§ 1973, 1973c. This Court has already held that compliance with federal law does not require preclearance under § 5 of the Voting Rights Act. In *Young v. Fordice*, 520 U.S. 273

(1997), this Court considered Mississippi's compliance with the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. §§ 1973gg *et seq.*, and declared, "The decision to adopt the NVRA federal registration system is not, by itself, a change for the purposes of § 5, for the State has no choice but to do so." 520 U.S. at 290. Here, Mississippi has not chosen to elect its Representatives at large. Indeed, Mississippi has made no choice at all; that is why the choice made by Congress in § 2a(c)(5) must be implemented. Nothing in either § 2 or § 5 remotely suggests that a choice by Congress must be evaluated under the Voting Rights Act.

Of course, any choices which Mississippi might make in complying with § 2a(c)(5) are subject to the strictures of the Voting Rights Act. This Court so held in *Young*: "It is the discretionary elements of the new federal system that the State must preclear." *Id.* For instance, federal law does not determine whether candidates must compete for individual seats, as opposed to running collectively on a single list; any decision made by Mississippi in this regard would have to comply with the Voting Rights Act. The Voting Rights Act would also apply to any decision by Mississippi to require a majority vote for election, as Louisiana does. *See Foster v. Love*, 522 U.S. 67 (1997).[15] If the District Court on remand were required to make such decisions because of Mississippi's continuing inability to decide, it would certainly design rules consistent with the Voting Rights Act, as the District Court did in *Jordan*

[15] On remand, the Court retained Louisiana's majority vote requirement while changing the election dates. *Love v. Foster*, 147 F.3d 383, 384-85 (5th Cir. 1998).

v. Winter, 604 F. Supp. 807 (N.D. Miss.), *aff'd mem.*, 469 U.S. 1002 (1984).

It should be noted, contrary to intervenors' contentions, that it is by no means obvious that the election of four Representatives at large would dilute black voting strength, even if § 2 applied. Two decades ago, *Jordan v. Winter* held that one Representative out of five must be elected from a district with a black majority. However, after the 1990 census, the District Court held that § 2 did not require that one of the three districts from which Supreme Court Justices are elected should contain a black majority. *Magnolia Bar Ass'n, Inc., v. Lee*, 793 F. Supp. 1386 (S.D. Miss. 1992), *aff'd*, 994 F.2d 1143 (5th Cir.), *cert. den.*, 510 U.S. 994 (1993). *Accord*, *National Ass'n for the Advancement of Colored People v. Fordice*, 252 F.3d 361 (5th Cir. 2001) (election of Public Service and Transportation Commissioners from identical districts). Whether, 20 years after *Jordan v. Winter*, the totality of the circumstances would require that one district out of four contain a black majority[16] is a question that would require careful consideration on a proper evidentiary record.[17]

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[16] It is possible, of course, that a decision by the State to eliminate a black majority district might constitute retrogression under § 5, although there appears to be no precedent considering the application of the retrogression standard where the total number of seats has been reduced.

[17] Plaintiffs declined to present such evidence because of the District Court's announcement that at-large elections would not be imposed. If this Court agrees that the Voting Rights Act has no application to the decision to comply with § 2a(c)(5), then no remand is necessary for the presentation of such evidence.

For these reasons, the Voting Rights Act presents no impediment to compliance with § 2a(c)(5).

CONCLUSION

For the reasons stated herein, plaintiffs and the Mississippi Republican Executive Committee ask this Court to reverse the judgment of the District Court and to remand for entry of a judgment requiring the defendants to conduct elections for Mississippi's Representatives in accordance with 2 U.S.C. § 2a(c)(5).

Respectfully submitted,

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In The
Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

On Cross-Appeal From The United States District Court For The Southern District Of Mississippi

BRIEF OF CROSS-APPELLEES BEATRICE BRANCH, ET AL.

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QUESTION PRESENTED

When a state loses a Representative in Congress and state authorities fail to produce a redistricting plan, must the federal courts require at-large elections for the state's Representatives even though the courts have sufficient time to implement a single-member redistricting plan prior to the next election?

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This brief is filed on behalf of cross-appellees Beatrice Branch, Rims Barber, L.C. Dorsey, David Rule, James Woodard, Joseph P. Hudson, and Robert Norvel. They are the plaintiffs in the state court proceedings, the intervenors in the Federal District Court proceedings now under review in this Court, and the appellants in No. 01-1437. The state defendants, who also are cross-appellees, have not filed any briefs in this Court. The cross-appellee Mississippi Democratic Executive Committee submitted a letter to the Clerk stating that it supports the position of the cross-appellees Beatrice Branch, et al.

In this cross-appeal, the Mississippi Republican Executive Committee (MREC) and the federal court plaintiffs contend that while the Federal District Court properly enjoined the use of the state court plan, it should have imposed at-large elections for Mississippi's members of Congress pursuant to 2 U.S.C. § 2a(c) rather than devise a single-member district plan. This issue will be relevant only if this Court affirms the District Court's injunction against the state court plan in the course of resolving the main appeal (No. 01-1437).

SUMMARY OF ARGUMENT

1. This claim has been waived because the cross-appellants failed to object to the absence of at-large elections when the District Court announced its single-member district plan on February 4. Pursuant to the District Court's order of that date, any "failure to object in accordance with this order will be deemed a waiver of all further objections to this plan."

2. 2 U.S.C. § 2c, passed in 1967, requires the establishment of single-member districts and provides that "Representatives shall only be elected from Districts so established." As is clear from the language, the historical context, and the legislative history, this law was passed to end at-large elections for members of the United States House of Representatives, including at-large elections ordered by federal courts as remedies for malapportionment in the wake of

Wesberry v. Sanders, 376 U.S. 1 (1964). The imposition of at-large elections pursuant to the 1941 provisions of 2 U.S.C. § 2a(c) would flatly contradict the 1967 statute. Either the 1967 law implicitly repeals the one from 1941, or leaves it in place for election eve emergencies where neither a legislature nor a court has devised a lawful single-member plan. Either way, the District Court here properly declined to impose at-large elections on the State of Mississippi.

3. Nothing about § 2c suggests that courts are not to enforce its provisions. The language does not tell courts to ignore the statute. By 1967, when the law was passed, courts were becoming very involved in congressional redistricting disputes, and Congress knew that. The floor debates show that members of Congress believed the courts would adhere to and enforce the statute. Federal courts have a duty to enforce federal law, and this law is no exception. If it were otherwise, states could ignore the Congressional prohibition against at-large elections in § 2c with impunity.

4. Even if at-large elections in Mississippi were otherwise required by § 2a(c), they would reduce and dilute minority voting strength in violation of the Voting Rights Act. According to the cross-appellants' theory, the at-large election requirement of § 2a(c) is triggered by the Mississippi legislature's decision not to adopt a single-member plan. If so, the legislature's decision is subject to review under the Voting Rights Act. Because any resulting at-large elections would violate the Act, it would be improper for a court to impose them

ARGUMENT

I. THE AT-LARGE CLAIM HAS BEEN WAIVED.

In their complaint, the federal court plaintiffs requested at-large elections or, in the alternative, a federal court-ordered redistricting plan. In a January 16, 2002 pretrial hearing, the Federal District Court indicated that it would not impose at-large elections. J.A. 26-27. In its February 4, 2002 order announcing its redistricting plan, the Federal District Court said: "The parties are directed to show cause by written objections [filed by February 9], why this court's redistricting plan . . . would not satisfy *all* state and *federal statutory* and constitutional *requirements. . . Failure to object in accordance with this order will be deemed a waiver of all further objections to this plan.*" No. 01-1437, J.S. App. 62a-63a (emphasis added).

In response, the federal court plaintiffs and the MREC filed comments saying the plan "satisfies all constitutional and statutory criteria." Comments of the Plaintiffs and Mississippi Republican Executive Committee, dated Feb. 8, 2002 (a copy is included in the appendix to the Conditional Motion to Affirm filed in this cross-appeal). Neither at that point nor any later point did they object to the failure to require at-large elections. Thus, under the terms of the District Court's February 4 order, these cross-appellants "waiv[ed] all further objections to this plan."

II. 2 U.S.C. § 2c MANDATES SINGLE-MEMBER CONGRESSIONAL DISTRICTS AND ALLOWS NO ROOM FOR COURT-ORDERED AT-LARGE ELECTIONS EXCEPT PERHAPS IN AN ELECTION EVE EMERGENCY.

2 U.S.C. § 2a(c), passed in 1941, reads as follows:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives . . . shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the state at large and the other Representatives from the districts then prescribed by the law of the State . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2c, passed in 1967, reads as follows:

> In each State entitled . . . to more than one Representative . . ., there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and *Representatives shall be elected only from Districts so established*, no district to elect more than one representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

(Emphasis added). The parenthetical at the end of § 2c permitted New Mexico and Hawaii to elect their representatives at large in the 1968 election but required them to use single-member districts thereafter.

The language, historical context, and legislative history of the 1967 statute, § 2c, demonstrate that it strictly mandates

single-member congressional districts and does not permit court-ordered at-large elections except perhaps in an election eve emergency. It either supersedes §2a(c) entirely or leaves it in place for situations, increasingly unlikely in the computer age, where legislatures fail to adopt lawful plans and courts do not have sufficient time to implement single-member remedies.

As specified by the 1967 statute, every state in the union with more than one United States Representative elects them from single-member districts. Since passage of the statute, courts confronted with congressional redistricting cases consistently have drawn single-member district plans rather than impose at-large elections, even when states have lost or gained seats.

The position advocated by the cross-appellants would change that. If they are correct, congressional elections in a number of states where courts imposed redistricting plans after a loss or gain of seats will convert from districts to total or partial at-large balloting, including Mississippi, Texas, and Colorado. *See, Balderas v. Texas*, No. 6:01cv158 (E.D. Tex. Nov. 14, 2001) (three-judge court), *aff'd mem.*, 122 S.Ct. 2583 (2002) ; *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). This would also mean that federal courts should have ordered New York to elect its 31 representatives at large in 1992 after it lost seats and the legislature initially deadlocked, and should have ordered Illinois to elect its 20 representatives at large in 1992 when its legislature could not agree on a solution after seats were lost. *See, Puerto Rican LDEF v. Gantt*, 796 F.Supp. 681 (E.D.N.Y. 1992) (three-judge court) (requiring implementation of a single-member districting plan in New York); *Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D. Ill. 1991)

(three-judge court) (requiring single-member plan in Illinois).[1] Similarly, in any Section 5 state where a seat is lost, at-large elections will be required if the legislature passes a plan but the plan is not precleared in a timely fashion, either because of the sort of Justice Department political mischief that occurred in Mississippi this year (see No. 01-1437, Brief for Appellants at 41-43) or because the United States Attorney General objects to a plan that truly is retrogressive and discriminatory.

But federal law does not require this unprecedented result. Instead, it prohibits it. As just mentioned, 2 U.S.C. § 2c, passed in 1967, mandates that "Representatives shall be elected *only from Districts*" in states with more than one representative. (Emphasis added). The language of the statute is definitive. The only exception was for New Mexico and Hawaii, and then only for one additional election.

In dictum in *Whitcomb v. Chavis*, 403 U.S. 124, 159 n. 39 (1971), this Court described the historical background of the statute:

> In 1842, Congress by statute required single-member districts for congressional elections. The substance of the restriction was continued . . . until 1929. In 1941, Congress enacted a law that required that until a State is redistricted in a manner provided by law after decennial reapportionment of the House, representatives were to be

---

[1] After initially being unable to agree on a plan, and after both a state court and a federal special master adopted plans, the New York legislature eventually reached agreement and enacted the state court plan as its own. That plan was used in the 1992 elections. *Puerto Rican LDEF v. Gantt*, 796 F.Supp. 698, 699 (E.D.N.Y. 1992) (three-judge court). But prior to that late development, the federal court was faced with a legislative stalemate over how to redistrict the state after the number of representatives was reduced from 34 to 31. In that situation, the court devised a single-member plan.

> elected from the districts prescribed by the law of the State, and that "if any of them are elected from the state at large they shall continue to be so elected," provided that if . . . a State is entitled to an increase in the number of representatives, the additional representatives shall be elected at large until the State is redistricted, and if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. *In 1967, Congress reinstated the single-member district requirement* . . . .

(Emphasis added, citations omitted).

The 1967 statute was passed against the backdrop of this Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), after which the validity of a number of congressional redistricting plans was thrown into doubt. Several courts responded by threatening to impose at-large congressional elections, and most of them referenced 2 U.S.C. § 2a(c). *See, e.g., Preisler v. Secretary of State of Missouri*, 257 F. Supp. 953, 981 (W.D. Mo. 1966) (three-judge court), *aff'd mem.* 385 U.S. 450 (1967); *Bush v. Martin*, 251 F. Supp. 484, 490 (S.D. Tex. 1966) (describing prior order); *Park v. Faubus*, 238 F. Supp. 62, 65-66 (E.D. Ark. 1965). As is clear from the legislative history of the 1967 statute, Congress then decided to require single-member districts in all instances (except in the next election in Hawaii and New Mexico) and to prevent courts from ordering at-large elections as a remedy for malapportionment. Senator Baker, the sponsor of the bill, made this plain a number of times prior to initial passage in the Senate, in both his own statements and in a colloquy with Senator Bayh:

> Mr. BAKER. . . . [This bill] strictly provides in a

> straightforward manner than when there is more that one Member of the House of Representatives from a State, the State must be redistricted, and that the Members may not run at large.

113 Cong. Rec. 31718 (1967).

> Mr. BAYH. . . . When we say "as amended, there shall be established by a law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from Districts so established, no district to elect more than one Representative," we are talking about either of two situations — whether the legislature reapportions or whether the court reapportions.
>
> Mr. BAKER. The Senator is correct.
>
> . . . .
>
> Mr. BAYH. . . . I just wish to make one brief comment in summary, in light of this colloquy. This will make it mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by State legislatures or by a Federal court.
>
> Mr. BAKER. That is my understanding

Id. at 31720.

The Senate initially passed the single-member bill in a form that allowed no exceptions for any states. In a general discussion of the importance of the bill when it reached the House, Representative Jacobs noted that the delegation in his home state of Indiana "faces the very serious threat of running at-large." *Id.* at 34037. He emphasized that the bill would prohibit at-large elections and would make it clear to federal courts that, if required to impose a remedy for

malapportionment, they must order single-member districts:

> Mr. JACOBS. Mr. Speaker, I doubt very seriously that there is much disagreement with the need for a law to prohibit at-large elections, generally, in the United States. . . . If this bill should become law, then in any State whose districts are declared unconstitutional a court could draw district lines and true up those districts that they deemed to be unconstitutional.

Id.

The House amended the bill so that Hawaii and New Mexico were permitted to conduct at large elections for one more cycle. When it returned to the Senate for further action, several senators discussed the reason for the bill:

> Mr. BAYH. . . .There is a great likelihood that, if agreement cannot be reached within a State, the court could well order the entire congressional delegation to run at large. The purpose of this particular bill is to avoid this possibility.

Id. at 34366.

> Mr. INOUYE. . . . This bill, as I see it, is framed only for States such as Indiana; under court order to elect their Representatives at large. This bill would relieve these States of this necessity. . . .

Id. at 34367. The Senate then passed the bill with the one-election exception for Hawaii and New Mexico that had been added by the House. *Id.* at 34369. *See also, Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal.) (discussing legislative history), *appeal dismissed*, 456 U.S. 941 (1982); *Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo.) (three-judge court) (discussing legislative history), *aff'd*

mem., 456 U.S. 966 (1982).

In light of the language of the bill and this legislative history, most of the lower courts addressing the issue have held that the 1967 statute supersedes the one from 1941. Shortly after passage of the 1967 statute, the three-judge court overseeing the Missouri redistricting case held that the new law relieved it of the obligation to follow 2 U.S.C. § 2a(c)(5), allowing it to vacate its earlier threat of at-large elections and instead implement a proper single-member plan if the legislature failed to do so. *Preisler v. Secretary of State of Missouri*, 279 F. Supp. 952, 967-969 (W.D. Mo. 1967), *aff'd sub nom. Kirkpatrick v. Preisler*, 394 U.S. 526 (1969). Other courts have agreed. *Shayer v. Kirkpatrick*, 541 F.Supp. at 926-927; *Assembly of California v. Deukmajian*, 639 P.2d at 954-955.

The cross-appellants cite only one case to the contrary, *Carstens v. Lamm*, 543 F. Supp. 68, 77-78 (D. Colo. 1982), and even it does not support their position. In *Carstens*, the Court held that § 2c did not repeal § 2a(c), but instead left the provisions of § 2a(c) in place for use "in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." *Id.* at 77-78. In the present case, of course, there was time for the courts to develop a plan and there was no need to resort to the drastic step of at-large elections.

Nevertheless, the cross-appellants suggest that while § 2c may express a general preference for single-member districts, § 2a(c) provides the only remedy when the legislature fails to enact a lawful plan. (Br. 14, 17-18). But an examination of the 1941 statute shows that it survives, at most, as an emergency measure. § 2a(c) sets out various scenarios that are triggered

when elections occur before "a State is redistricted in the manner provided by the law thereof after any apportionment." § 2a(c)(1) says that when "there is no change in the number of Representatives, they shall be elected from the districts then prescribed . . . and if any of them are elected . . . at large they shall continue to be so elected." Under the cross-appellants' reading, Hawaii could have maintained at-large elections after 1968 irrespective of the prohibition in § 2c so long as it continued to decline — as it had declined immediately after the 1960 apportionment — to "redistrict[] in the manner provided by the law thereof." A federal court could have done nothing about it, according to the cross-appellants. Furthermore, § 2a(c)(1), if taken literally, would allow states to continue to use malapportioned pre-existing districts, again by the simple expedient of declining to redistrict. (The cross-appellants concede that this would violate the equal population principle of Article I, § 2 and that § 2a(c)(1) no longer remains viable in that respect. (Br. 17)).

§ 2a(c)(2), provides that "if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of the such State." But as the cross-appellants concede, the existing districts would violate the equal population requirement of Article I, § 2 in such a situation. (Br. 17). Absent an emergency, a court clearly must redraw those districts if the state legislature fails to do so. Under the cross-appellants' view, however, fidelity to the remainder of § 2a(c)(2) would require the court to redraw only the existing number of districts, leaving the new Representatives to be elected at large notwithstanding the command of § 2c.

Thus, for the cross-appellants, § 2c's single-member requirement is a complete nullity if a state (in the words of §

2a(c)) chooses not to "redistrict[] in the manner provided by the law thereof after any apportionment." If the state gains or loses seats, at-large elections will be utilized despite § 2c. If the state maintains the same number of seats, it will be redistricted, but only because the Constitution requires it. § 2c has no relevance, according to the cross-appellants, to any situation where a state has failed to enact a lawful redistricting plan.

But as is clear from the consequences of the various provisions of § 2a(c), this makes no sense. The scenarios described a moment ago completely contradict the explicit language, historical context, and legislative history of § 2c. That statute abolishes at-large congressional elections entirely except the single exception that allowed Hawaii and New Mexico to use them in 1968. Although § 2a(c) remains on the books, it stands at most as a backstop for election eve emergencies of the type that are increasingly unlikely to occur as redistricting technology improves.[2]

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[2] Although this leaves § 2a(c) of little practical value, this is not unprecedented. The current law books occasionally include provisions that have grown to be anachronisms. *See, e.g.*, 2 U.S.C. § 6 (1872 statute, never repealed, requiring reduction of the number of Representatives apportioned to a state if the state denies "the right of any of the male inhabitants thereof" to vote in certain elections).

The cross-appellants cite *Smiley v. Holm*, 285 U.S. 355 (1932), where this Court ordered at-large elections when a seat had been lost even though the 1911 federal redistricting statute provided that Representatives "shall be elected by districts." *Id.* at 362 n.1, quoting Act of August 8, 1911, c.5, § 3, 37 Stat. 13. But not long thereafter, this Court held in *Wood v. Broom*, 287 U.S. 1, 7 (1932), that the districting provision of the 1911 statute had expired when it was not renewed in 1929, thus rendering it inoperative at the time of *Smiley*. By contrast, the 1967 single-member requirement of § 2c is alive and well at the present time. Furthermore, *Smiley* was decided in the era of *Colegrove v. Green*, 328 U.S. 549 (1946),

Ultimately, this Court need not decide whether the 1967 statute completely repealed the 1941 statute, or whether the two peacefully coexist in the manner described in *Carstens*. Either way, the District Court here acted properly in not imposing at-large elections.

III. THE COURTS HAVE THE AUTHORITY TO ENFORCE THE SINGLE-MEMBER REQUIREMENT OF 2 U.S.C. § 2c.

According to the cross-appellants, § 2c "gives no direction to courts" and its provisions are to be enforced only by legislatures, not courts. Therefore, they say, the District Court here had no business imposing a single-member district plan. (Br. 23). Of course, courts enforce federal statutes all the time even though the words of the statutes do not"give [them] direction." Most federal statutes that are binding upon states — such as Section 2 of the Voting Rights Act, 42 U.S.C. § 1973c — do not explicitly refer to courts. Yet courts enforce them when the states do not.

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when the general understanding was consistent with Justice Frankfurter's statement that "no court can affirmatively re-map the . . . districts" for members of Congress or other public officers. *Id.* at 533 (opinion of Frankfurter, J.), *see also id.* at 565 (Rutledge, J., concurring). While courts at the time of *Smiley* and *Colegrove* would not consider designing redistricting plans to enforce a single-member requirement, the landscape had changed by 1967. *See, Reynolds v. Sims*, 377 U.S. 533, 586-587 (1964) (remedial options for one-person, one-vote violations include court-ordered plans). It was understood by members of Congress and judges alike that, with the 1967 act, federal judges were expected to enforce its provisions by crafting new single-member district plans when appropriate. Thus, any decision by the *Smiley* court to decline enforcement of the 1911 single-member requirement has no relevance to the 1967 statute and the authority of the present-day federal courts to implement single-member plans.

Indeed, § 2c would be rather toothless if states that lost seats could avoid the single-member district requirement simply by declining to pass a redistricting plan. The cross-appellants say that "§ 2a(c) provides the remedy for the violation of § 2c by legislative inaction."(Br. 6). But the "remedy" that § 2a(c)(5) would provide is one of at-large elections, which is what the single-member district requirement of § 2c is designed to preclude. It seems strange that the remedy for the violation of a statute would be the imposition of that which the statute seeks to avoid.

Moreover, if courts cannot enforce the provisions of § 2c, passed in 1967, it would follow that they also cannot enforce the provisions of the statute upon which cross-appellants rely — § 2a(c)(5), passed in 1941 — inasmuch as the language of the latter does not explicitly direct itself to courts. That, of course, would be fatal to the cross-appellants' claim here, since they are asking the federal courts to order Mississippi to conduct its elections at-large in the name of the 1941 statute.[3]

Yet the cross-appellants contend that the phrase "by law" from § 2c is what demonstrates that Congress, when passing that provision in 1967, intended that it only be enforced by legislatures and not courts. But surely those words do not mean

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[3] In an interesting twist, the cross-appellants seem to take the position that they have no "private right of action to enforce § 2a(c)." (Br. 25 n.14). Rather, they suggest, the Federal District Court properly enjoined use of the pre-existing five-district congressional redistricting plan because of its infirmities and, in the course of devising a remedy, should have mandated at-large elections so that the remedial scheme complied with § 2a(c). *Id.* But the same would hold true for the single-member district requirement in § 2c. Even under the cross-appellants' theory that there is no right of action under § 2c, the federal court nevertheless should, as a remedial principle, draw a plan consistent with the statute's single-member requirement.

that courts — entrusted with implementing federal law when states fail to do so — should abstain with respect to this one particular statute. If the words did carry that meaning, there would be no recourse if one or more state legislatures — even in states that gained or lost no seats — blatantly disregarded § 2c and passed laws instructing their election officials to elect all representatives at-large. Surely the statute is not so easily evaded. If Congress had intended in 1967 to preclude federal courts from enforcing this statute, it would have said so in words much more explicit than these.[4]

Indeed, the cross-appellants admit that "by 1967, courts had begun to act, taking control of redistricting decisions after *Baker [v. Carr*, 369 U.S. 186 (1962)] and *Wesberry [v. Sanders*, 376 U.S. 1 (1964)]." (Br. 23). As illustrated by the earlier quotations in this brief from the 1967 legislative history, the primary purpose of § 2c was to mandate single-member districts and require courts to employ them in remedial plans rather than impose at-large elections. It defies reason to suggest that Congress did not intend courts to enforce the single-member requirement of this 1967 statute.

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[4] The cross-appellants refer to a proposed version of the statute offered by Senator Bayh that did not include the words "by law." (Br. 19, citing 113 Cong. Rec. 31,718 (1967)). But the Congressional Record shows that much of the debate over the different versions offered by Senators Bayh and Baker was over their respective treatment of Hawaii and New Mexico. *Id.* 31718-31719. To the extent they discussed the words "by law" in Senator Baker's proposal, both Senators Bayh and Baker agreed that those words would not preclude courts from enforcing the new statute and implementing single-member plans to remedy problems of malapportionment. *Id.* 31719-31720.

IV. THE IMPOSITION OF AT-LARGE ELECTIONS IN MISSISSIPPI WOULD VIOLATE THE VOTING RIGHTS ACT.

Finally, even if the cross-appellants were otherwise correct, the imposition of at-large elections in Mississippi would lead to a dilution of black voting strength in violation of Section 2 of the Voting Rights Act as well as retrogression in violation of Section 5 of the Act, 42 U.S.C. § 1973. Mississippi presently elects one of its Representatives from a majority-black district. Statewide, however, the population is 61% white and 36% black. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *aff'd mem.*, 469 U.S. 1002 (1984) (electing all members of Congress in Mississippi from majority-white districts violates Section 2).

The cross-appellants say that the Voting Rights Act does not apply to acts of Congress. They cite *Young v. Fordice*, 520 U.S. 273, 290 (1997), where this Court said "[t]he decision to adopt the . . . federal registration system is not . . . a change for the purposes of § 5, for the State has no choice but to do so." However, even if federal law requires at-large elections when a legislature declines to redistrict, this is not a situation where the legislature "ha[d] no choice." The legislature could have maintained districts by passing a plan. The legislature's decision not to do so, and the resulting implementation of at-large elections, would be subject to scrutiny under the Act.

Otherwise, legislatures in states that lost seats in Congress could easily avoid the requirements of the Voting Rights Act by refusing to adopt a plan. This would, if the cross-appellants are correct, put the election of all members of Congress from such a state in the hands of the majority-white statewide electorate, and minority citizens would be without recourse. But Congress passed the Voting Rights Act in 1965, and amended Section 2

of the Act in 1982, with a recognition of the potential for dilution caused by at-large elections. *See, Allen v. State Board of Elections*, 393 U.S. 544, 564-569 (1969); *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986). One of the more pervasive tools of racial discrimination employed by Mississippi and other southern states was the conversion of elections for particular groups of officeholders from district to at-large balloting. *See, e.g., Stewart v. Waller*, 404 F. Supp. 206 (N.D. Miss. 1975) (three-judge court) (striking down as purposefully discriminatory a 1962 Mississippi statute requiring municipal alderman to be elected at large rather than from districts). There is nothing to suggest that Congress left a loophole in the Voting Rights Act by which those states could use that very gambit to dilute minority voting strength in elections for the United States House of Representatives.

Moreover, even if the state's inaction were immune from Voting Rights Act review, the cross-appellants concede that the Federal District Court, in adopting a remedial plan to replace the invalid pre-existing plan, was required to conform its remedy to the Voting Rights Act. (Br. 25 n.14, *citing, Abrams v. Johnson*, 521 U.S. 74, 96 (1997)). That being the case, the District Court cannot impose at-large elections. Of course, the cross-appellants also contend that the District Court was required to follow §2a(c) and implement at-large voting. (Br. 25 n.14). To the extent the District Court is required to consider both statutes, the Voting Rights Act — which is the more recent enactment — is the one that must be followed.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the decision of the District Court should be affirmed to the extent the Court declined to impose at-large elections for the members of the United States House of Representatives from Mississippi.

Respectfully Submitted,

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In The
Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

On Cross-Appeal From The United States District Court For The Southern District Of Mississippi

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REPLY BRIEF OF CROSS-APPELLANTS

The briefs of the parties and of the United States in this cross-appeal, concerning the meaning and continued validity of 2 U.S.C. § 2a(c)(5), offer this Court a clear choice between legislative language and legislative history. Intervenors and the United States argue that those Members of Congress who were cognizant of the issue in 1967 hoped to protect themselves and their colleagues against the possibility of having to run for election at large. This Court must decide whether the language they chose in 2 U.S.C. § 2c accomplished that purpose. Under traditional rules of statutory construction, § 2a(c)(5) remains in effect and compels the election of Mississippi's four Representatives at large.

ARGUMENT

I. SECTION 2a(c) HAS NEVER BEEN REPEALED.

Neither the United States nor intervenors contest the standard by which an implied repeal is to be determined. This Court has plainly stated that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Applying this undisputed test, it is clear that § 2a(c)(5) has not been repealed.

A. *Smiley v. Holm* demonstrates that § 2a(c)(5) and § 2c are capable of co-existence.

Section 2c is not the first statute to require that Members of the House of Representatives be elected by

districts. In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court considered the language of the statute authorizing the Thirteenth Census, which, like § 2c, provided that Representatives "shall be elected by districts." *Id.*, at 362 n.1, quoting Act of August 8, 1911, c.5, § 3, 37 Stat. 13. Section 4 of the same statute required, as § 2a(c)(2) does today, that Representatives added by a new apportionment should be elected at large "until such State shall be redistricted in the manner provided by the laws thereof." Notwithstanding the statutory requirement that Representatives be elected by districts, this Court in *Koenig v. Flynn*, 285 U.S. 375 (1932), affirmed the judgment by the New York Court of Appeals that its two new Representatives be elected at large. Moreover, even though no provision of the 1911 statute expressly so provided, this Court held in *Smiley* that, where Minnesota had lost a seat, "unless and until new districts are created, all Representatives allotted to the state must be elected by the state at large." 285 U.S. at 374-75. In *Carroll v. Becker*, 285 U.S. 380 (1932), the Court affirmed the judgment of the Supreme Court of Missouri requiring the same result. Just as at-large elections in New York, Missouri, and Minnesota could co-exist with § 3 of the 1911 statute, so also can at-large elections under § 2a(c)(5) co-exist with § 2c.

The United States never addresses *Smiley* at all, and intervenors do so only ineffectively. They observe that *Wood v. Broom*, 287 U.S. 1, 7 (1932), held that the 1911 statute had expired, Cross-Appellees' Brief at 12 n.2, but *Wood* was decided months after *Smiley*. Although the defendant in *Smiley* "insisted that the act of Congress of August 8, 1911, was no longer in force," 285 U.S. at 362-63, this Court found no need to resolve that question, instead approving elections from the State at large and

declaring that "the general provisions of the act of 1911 cannot be regarded as intended to have a different import." *Id.*, at 375.

Unable to distinguish *Smiley*, intervenors simply disparage it as a relic of "the era of *Colegrove v. Green*, 328 U.S. 549 (1946)." Cross-Appellees' Brief at 12 n.2. *Smiley* and *Colegrove* are not relics, however, but form the foundation of this Court's redistricting jurisprudence. This Court explicitly relied on *Colegrove* in *Baker v. Carr*, 369 U.S. 186, 232 (1962), explaining, "On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley v. Holm*, but in two opinions, one for three Justices, 328 U.S. at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U.S. at 564." Indeed, *Smiley* found a redistricting claim to be justiciable and held elections at large to be the proper relief.

While ignoring *Smiley*, the United States relies on the undisputed proposition that a subsequently enacted statute like § 2c must be given full effect. Brief for the United States at 10. The only civil case on which the United States relies,[1] *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), concerns the relationship between the Securities Exchange Act and previously enacted antitrust statutes. Plaintiffs challenged fixed commission

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[1] Both *United States v. Yuginovich*, 256 U.S. 450 (1921), and *United States v. Tynen*, 78 U.S. (11 Wall.) 88 (1870), concern the effect of new criminal enactments on earlier statutes. In the more recent case, this Court explained, "In construing penal statutes, it is the rule that more recent enactments repeal former ones practically covering the same acts, but fixing a lesser penalty." 256 U.S. at 463. Plainly, this principle has no application here.

rates as an antitrust violation, even though the Securities Exchange Commission had frequently reviewed those rates over the years and had approved their continuation before their ultimate abolition. This Court did not find the antitrust acts to have been repealed, but it did find that Congress had intended to exempt rate regulation from their scope:

> The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity.

Id., at 691. In short, approval of fixed rates under the Exchange Act and their abolition under the Sherman Act could not co-exist.

No such direct conflict is presented between § 2c and § 2a(c)(5). Section 2c, like § 3 of the 1911 statute, provides generally that Representatives should be elected by districts. This Court in *Smiley* found that the general rule could co-exist peacefully with the special requirement of elections at large where legislatures are unable to agree. In the face of the holding in *Smiley*, it cannot be said that § 2c cannot co-exist with § 2a(c)(5).

B. Congress did not clearly express an intent to repeal § 2a(c)(5).

Even though § 2c and § 2a(c)(5) are capable of co-existence, the courts need not continue to regard each

statute as effective if there is "a clearly expressed congressional intention to the contrary." *Morton*, *supra*, 417 U.S. at 551. Because no such clearly expressed intention emerges from an analysis of § 2c, § 2a(c)(5) remains in effect.

Both intervenors and the United States examine the legislative history as if this were a contract dispute between Senator Baker and Senator Bayh. Senator Baker originally understood his amendment exactly as do plaintiffs and the Mississippi Republican Executive Committee. When Senator Bayh asked him whether the term "by law" in his amendment would apply to both legislatures and courts, Senator Baker replied, "So, in answer to the question, this language would imply, to me, without equivocation, that it would be the duty of the State legislature by law to create these districts." 113 Cong. Rec. 31,719 (1967). After a few minutes of prodding from Senator Bayh, however, Senator Baker did equivocate and ultimately agreed that his amendment would govern both legislatures and courts. *Id.*, at 31,720. While that admission would probably bind Senator Baker in a contract case, neither the United States nor intervenors cite any authority to suggest that this parol evidence would bind the 98 other Senators and 435 Representatives who may have had no knowledge of it.[2]

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[2] The colloquy does negate any argument that Senator Baker's amendment was facially inconsistent with § 2a(c)(5). Senator Baker himself originally understood the language as being directed only to the actions of legislatures. In the House, Representative Denney of Nebraska read the language the same way. In opposing the resolution to consider Senator Baker's amendment, Representative Denney said:

(Continued on following page)

An intent to repeal an earlier statute, like legislative intent generally, must be apparent from the language of the new statute itself. This Court has plainly stated that "an implied repeal must ordinarily be evident from the language or operation of a statute." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 470 (1982). It is not uncommon for "the language or operation of a statute" to differ significantly from the expressed opinions of its supporters. Answering a contention that the drafters of one statute would have been surprised by its breadth, this Court replied, "Congress' 'inklings' are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985). Here, the language Senator Baker chose may have been narrower than he and Senator Bayh thought, but that does not authorize this Court to disregard the rules of statutory construction by elevating their conversation above the statutory language itself.

The rules of construction begin with statutory language because Members of Congress vote on that language, not on colloquies between their colleagues. This Court presumes "that Congress legislates with knowledge of our basic rules of statutory construction," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991), and

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> Mr. Speaker, let us assume that the State Legislature of Nebraska could not agree upon new boundary lines by March 15. This bill says that the State of Nebraska Representatives cannot run at large, and the Federal courts have ruled that we must run at large. We are at an impasse.

Id., at 34,037. Representative Denney, at least, did not view the language as having any effect on courts.

one of those rules, as expressed in *Morton v. Mancari*, *supra*, is that implied repeals are not favored. This Court also presumes that Congress knows existing law, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998), and any Member who had paid the slightest attention to the efforts over the previous months to repeal § 2a(c)(5) would certainly have been aware of its existence. Finally, this Court is conscious of the effect of its own prior decisions: "When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." *Williams v. Taylor*, 529 U.S. 420, 434 (2000). In *Smiley* this Court had considered a previous statute requiring election by districts, but it had found that language to be fully consistent with other statutory language and remedial decrees requiring the election of some Representatives at large. For this Court to disregard its prior result in *Smiley* would require more "specific direction to the contrary" than a brief and confused conversation between Senator Bayh and Senator Baker.

Applying the standard rules of statutory construction to the adoption of § 2c, it is impossible to find "a clearly expressed congressional intention," *Morton*, *supra*, 417 U.S at 551, to repeal § 2a(c)(5). That statute remains in effect, and this Court must now determine its proper effect on the judgment in this case.

II. A REMEDIAL ORDER IN A CONGRESSIONAL REDISTRICTING CASE MUST BE CONSISTENT WITH § 2a(c)(5).

All parties and all amici agree that the District Court acted with proper authority in enjoining the enforcement

of Mississippi's old five-district plan for elections to the House of Representatives, Miss. Code Ann. § 23-15-1037 (Rev. 2001). App. 2a. Likewise, there is common agreement that any remedial judgment entered in such circumstances must be consistent with applicable federal statutes. For instance, this Court in *Abrams v. Johnson*, 521 U.S. 74, 96 (1997), required adherence to standards set by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Moreover, intervenors and the United States argue that § 2c must be enforced by remedial decrees. Brief for the United States at 9-12; Cross-Appellees' Brief at 13-15. Accordingly, if § 2c did not repeal § 2a(c)(5), there can be no real dispute that remedial decrees should comply with § 2a(c)(5), to the extent that statute applies.[3] The real question before this Court, then, is how, if at all, § 2a(c)(5) applies to the facts of this case.

As an initial matter, § 2c does not apply here for two reasons. First, as previously explained, Cross-Appellants' Brief at 15-16, § 2c is directed to legislatures, not courts.[4]

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[3] Under the circumstances of this case, then, there is no need to determine whether Congress intended to create a private right of action under either § 2c or § 2a(c). *Compare* Cross-Appellants' Brief at 25 n.14 *with* Cross-Appellees' Brief at 14 n.3. All parties agree that the District Court had authority to issue a remedial order and that the order should have been consistent with whatever statutes may be applicable.

[4] The argument of the United States to the contrary is based on its analysis of the term "established law," Brief for the United States at 11-12, not the language actually chosen by Congress in 1967. By contrast, the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, uses the same phrase as § 2c in requiring that federal offices "shall be established by law." This Court has noted regarding that phrase:

> [T]he Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill

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Indeed, as demonstrated earlier, *supra*, at 5 & n.2, some Members during the debate read § 2c as having no application to courts. Second, to the extent § 2c also applies here, the specific language of § 2a(c)(5) must be enforced, because "a more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980). That is exactly what this Court did in *Koenig v. Flynn, supra,* when it enforced the at-large election requirement of § 4 of the 1911 statute notwithstanding the general requirement of § 3 that Representatives be elected by districts.

As for § 2a(c)(5), the United States argues that, even if it has not been repealed, it does not apply here because

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> federal offices. See C. Warren, The Making of the Constitution 642 (1937) (discussing references in the Appointments Clause to principal offices " 'established by Law,' " and to the power of appointing inferior officers which " 'Congress may by law' " vest as specified).

Weiss v. United States, 510 U.S. 163, 187 n.2 (1994). This Court has similarly noted that officials appointed by courts are not "established by law", which means established by statute:

> The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See *Burnap v. United States*, 252 U.S. 512, 516-517 (1920); *United States v. Germaine*, 99 U.S. 508, 511-512 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute.

Freytag v. C.I.R., 501 U.S. 868, 881 (1991). If "shall be established by law" in the Appointments Clause allows only legislative, and not judicial or executive, creation of offices, "shall be established by law" in § 2c similarly allows only legislative, and not judicial or executive, creation of districts.

"the State was 'redistricted in the manner provided by the law thereof' by virtue of the federal court order in this case." Brief for the United States at 11 n.4. There are two problems with this argument. First, while each State is undoubtedly bound by federal law, the natural reading of "the law thereof" refers to the law of each State, not the law of the federal government. Indeed, then-Justice Rehnquist appeared to read to the statute as referring to state law in his opinion in *Republican Nat'l Committee v. Burton*, 455 U.S. 1301, 1302 n.* (Rehnquist, J., in chambers), *appeal dismissed & cert. denied*, 456 U.S. 941 (1982).[5] Second, at the time the District Court rendered its judgment, Mississippi had not been redistricted in the manner provided by any law, state or federal. Thus, when the District Court was deciding the case, § 2a(c)(5) still applied by its terms and should have been followed.

By the same token, § 2a(c) has no application whatsoever after "a State is redistricted in the manner provided by the law thereof." The plain language of the statute indicates that, once a legislature has adopted a new plan, the five options listed in the statute have no further legal effect. Thus, there is no basis for the fear expressed by the United States and intervenors that legislatures might try to evade § 2c by adopting statutes requiring the election of some or all Representatives at large. Brief for the United States at 27; Cross-Appellees' Brief at 15. There is no evidence that any legislature has ever disregarded the

[5] Similar language in the general criminal jurisdiction statute, 18 U.S.C. § 3231, indisputably refers to state, not federal, law: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

clear command of Congress,[6] and, even if one did, § 2a(c) would not restrict the remedial authority of the federal courts after a legislature had completed the redistricting procedure required by its law.

Intervenors and the United States argue that the fifth clause of § 2a(c) should not be applied because some of the other clauses may be presently unenforceable. Brief for the United States at 27-29; Cross-Appellees' Brief at 11-12. Any difficulty in enforcing the earlier clauses, however, arises, not from incompatibility with § 2c, but from this Court's constitutional decisions after 1941.[7] Indeed, the retention of existing districts where there has been no change in the number of Representatives, as required by § 2a(c)(1), is fully consistent with § 2c, even where population shifts may have rendered their populations unequal. Congress in 1967 was well aware of the complications created by this Court's redistricting jurisprudence, and it had developed comprehensive plans to address those problems; it simply refused to enact any of them. *See* Cross-Appellants' Brief at 18-19. In declining to act,

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[6] As previously discussed, Cross-Appellants' Brief at 11-12, some legislatures did require Representatives to be elected at large in the years after this Court announced in *Wood v. Broom*, *supra*, that the statutory requirement of election from districts had expired. However, no legislature has repeated that practice since § 2c took effect.

[7] Of course, there is no decision of this Court directly applying those principles to an act of Congress. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court invalidated state statutes for failure to comply with the equal population requirement of Art. I, § 2, but there is no case which invalidates election procedures required by Congress acting under the power delegated by Art. I, § 4. That issue need not be addressed in this case, because no party suggests that § 2a(c)(5) is unconstitutional.

Congress was certainly aware that § 2a(c)(5) might require some States to elect their entire delegations at large, but it may also have been satisfied that such threats in the past had always produced a redistricting compromise. *See* Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv.L.Rev. 1057, 1087-88 (1958). Whatever subjective intentions or expectations Members of Congress may have had, the fact remains that the enactment of § 2c did not remove any of the provisions of § 2a(c) from the books.

Finally, intervenors contend that Congress intended to subordinate § 2a(c)(5) to the requirements of § 2 and § 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973c. Cross-Appellees' Brief at 16-17. The United States does not support intervenors' suggestion that the failure of a State to act must be reviewed under § 5 before federal law can be enforced. That question need not be resolved here, because the Attorney General reviewed and approved exactly the same decision when Miss. Code Ann. § 23-15-1039 (Rev. 2001), requiring elections at large when Mississippi loses a seat and fails to redistrict, was reenacted in 1986. 1986 Miss. Gen. Laws ch. 495, § 308. Because the Attorney General has already expressly approved Mississippi's decision to elect Representatives at large, as § 2a(c)(5) requires, there is no need for further review under § 5. In addition, not only did intervenors fail to prove that such elections would violate § 2, they present no reason to suppose that Congress intended its own enactments to be subject to challenge under § 2.[8] Absent

[8] The statutes considered here and the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.*, considered in *Young v. Fordice*, 520 U.S. 273 (1997), are not the only instances in which Congress has

(Continued on following page)

any indication that Congress intended § 2 as a mechanism to avoid enforcement of its own enactments, § 2a(c)(5) should have been followed by the District Court.

In short, neither the United States nor intervenors offer any reason why the District Court's remedial judgment should have disregarded § 2a(c)(5). That statute remains in effect, and the District Court erred in entering a judgment which precludes Mississippi from complying with it. Because both federal law and Mississippi law, properly approved by the Attorney General under § 5, provide for Representatives to be elected at large under these circumstances, the District Court's judgment should be reversed.

CONCLUSION

For the reasons stated herein and in their original brief, plaintiffs and the Mississippi Republican Executive Committee ask this Court to reverse the judgment of the District Court and to remand for entry of a judgment requiring the defendants to conduct elections for

imposed election duties on the States. For instance, the question of the proper enforcement of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff *et seq.*, is presently presented to this Court by the petition for certiorari pending in *Forrester v. New Jersey Democratic Party, Inc.*, No. 02-555.

Mississippi's Representatives in accordance with 2 U.S.C. § 2a(c)(5).

Respectfully submitted,

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REPLY

BRIEF

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In The
Supreme Court of the United States

JOHN ROBERT SMITH; SHIRLEY HALL; GENE WALKER; and MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Cross-Appellants,

v.

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; ROBERT NORVEL; ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,

Cross-Appellees.

On Cross-Appeal From The United States District Court For The Southern District Of Mississippi

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REPLY BRIEF OF CROSS-APPELLANTS

The briefs of the parties and of the United States in this cross-appeal, concerning the meaning and continued validity of 2 U.S.C. § 2a(c)(5), offer this Court a clear choice between legislative language and legislative history. Intervenors and the United States argue that those Members of Congress who were cognizant of the issue in 1967 hoped to protect themselves and their colleagues against the possibility of having to run for election at large. This Court must decide whether the language they chose in 2 U.S.C. § 2c accomplished that purpose. Under traditional rules of statutory construction, § 2a(c)(5) remains in effect and compels the election of Mississippi's four Representatives at large.

ARGUMENT

I. SECTION 2a(c) HAS NEVER BEEN REPEALED.

Neither the United States nor intervenors contest the standard by which an implied repeal is to be determined. This Court has plainly stated that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Applying this undisputed test, it is clear that § 2a(c)(5) has not been repealed.

A. *Smiley v. Holm* demonstrates that § 2a(c)(5) and § 2c are capable of co-existence.

Section 2c is not the first statute to require that Members of the House of Representatives be elected by

districts. In *Smiley v. Holm*, 285 U.S. 355 (1932), this Court considered the language of the statute authorizing the Thirteenth Census, which, like § 2c, provided that Representatives "shall be elected by districts." *Id.*, at 362 n.1, quoting Act of August 8, 1911, c.5, § 3, 37 Stat. 13. Section 4 of the same statute required, as § 2a(c)(2) does today, that Representatives added by a new apportionment should be elected at large "until such State shall be redistricted in the manner provided by the laws thereof." Notwithstanding the statutory requirement that Representatives be elected by districts, this Court in *Koenig v. Flynn*, 285 U.S. 375 (1932), affirmed the judgment by the New York Court of Appeals that its two new Representatives be elected at large. Moreover, even though no provision of the 1911 statute expressly so provided, this Court held in *Smiley* that, where Minnesota had lost a seat, "unless and until new districts are created, all Representatives allotted to the state must be elected by the state at large." 285 U.S. at 374-75. In *Carroll v. Becker*, 285 U.S. 380 (1932), the Court affirmed the judgment of the Supreme Court of Missouri requiring the same result. Just as at-large elections in New York, Missouri, and Minnesota could co-exist with § 3 of the 1911 statute, so also can at-large elections under § 2a(c)(5) co-exist with § 2c.

The United States never addresses *Smiley* at all, and intervenors do so only ineffectively. They observe that *Wood v. Broom*, 287 U.S. 1, 7 (1932), held that the 1911 statute had expired, Cross-Appellees' Brief at 12 n.2, but *Wood* was decided months after *Smiley*. Although the defendant in *Smiley* "insisted that the act of Congress of August 8, 1911, was no longer in force," 285 U.S. at 362-63, this Court found no need to resolve that question, instead approving elections from the State at large and

declaring that "the general provisions of the act of 1911 cannot be regarded as intended to have a different import." *Id.*, at 375.

Unable to distinguish *Smiley*, intervenors simply disparage it as a relic of "the era of *Colegrove v. Green*, 328 U.S. 549 (1946)." Cross-Appellees' Brief at 12 n.2. *Smiley* and *Colegrove* are not relics, however, but form the foundation of this Court's redistricting jurisprudence. This Court explicitly relied on *Colegrove* in *Baker v. Carr*, 369 U.S. 186, 232 (1962), explaining, "On the issue of justiciability, all four Justices comprising a majority relied upon *Smiley v. Holm*, but in two opinions, one for three Justices, 328 U.S. at 566, 568, and a separate one by Mr. Justice Rutledge, 328 U.S. at 564." Indeed, *Smiley* found a redistricting claim to be justiciable and held elections at large to be the proper relief.

While ignoring *Smiley*, the United States relies on the undisputed proposition that a subsequently enacted statute like § 2c must be given full effect. Brief for the United States at 10. The only civil case on which the United States relies,[1] *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659 (1975), concerns the relationship between the Securities Exchange Act and previously enacted antitrust statutes. Plaintiffs challenged fixed commission

[1] Both *United States v. Yuginovich*, 256 U.S. 450 (1921), and *United States v. Tynen*, 78 U.S. (11 Wall.) 88 (1870), concern the effect of new criminal enactments on earlier statutes. In the more recent case, this Court explained, "In construing penal statutes, it is the rule that more recent enactments repeal former ones practically covering the same acts, but fixing a lesser penalty." 256 U.S. at 463. Plainly, this principle has no application here.

rates as an antitrust violation, even though the Securities Exchange Commission had frequently reviewed those rates over the years and had approved their continuation before their ultimate abolition. This Court did not find the antitrust acts to have been repealed, but it did find that Congress had intended to exempt rate regulation from their scope:

> The Securities Exchange Act was intended by the Congress to leave the supervision of the fixing of reasonable rates of commission to the SEC. Interposition of the antitrust laws, which would bar fixed commission rates as per se violations of the Sherman Act, in the face of positive SEC action, would preclude and prevent the operation of the Exchange Act as intended by Congress and as effectuated through SEC regulatory activity.

Id., at 691. In short, approval of fixed rates under the Exchange Act and their abolition under the Sherman Act could not co-exist.

No such direct conflict is presented between § 2c and § 2a(c)(5). Section 2c, like § 3 of the 1911 statute, provides generally that Representatives should be elected by districts. This Court in *Smiley* found that the general rule could co-exist peacefully with the special requirement of elections at large where legislatures are unable to agree. In the face of the holding in *Smiley*, it cannot be said that § 2c cannot co-exist with § 2a(c)(5).

B. Congress did not clearly express an intent to repeal § 2a(c)(5).

Even though § 2c and § 2a(c)(5) are capable of co-existence, the courts need not continue to regard each

statute as effective if there is "a clearly expressed congressional intention to the contrary." *Morton*, *supra*, 417 U.S. at 551. Because no such clearly expressed intention emerges from an analysis of § 2c, § 2a(c)(5) remains in effect.

Both intervenors and the United States examine the legislative history as if this were a contract dispute between Senator Baker and Senator Bayh. Senator Baker originally understood his amendment exactly as do plaintiffs and the Mississippi Republican Executive Committee. When Senator Bayh asked him whether the term "by law" in his amendment would apply to both legislatures and courts, Senator Baker replied, "So, in answer to the question, this language would imply, to me, without equivocation, that it would be the duty of the State legislature by law to create these districts." 113 Cong. Rec. 31,719 (1967). After a few minutes of prodding from Senator Bayh, however, Senator Baker did equivocate and ultimately agreed that his amendment would govern both legislatures and courts. *Id.*, at 31,720. While that admission would probably bind Senator Baker in a contract case, neither the United States nor intervenors cite any authority to suggest that this parol evidence would bind the 98 other Senators and 435 Representatives who may have had no knowledge of it.[2]

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[2] The colloquy does negate any argument that Senator Baker's amendment was facially inconsistent with § 2a(c)(5). Senator Baker himself originally understood the language as being directed only to the actions of legislatures. In the House, Representative Denney of Nebraska read the language the same way. In opposing the resolution to consider Senator Baker's amendment, Representative Denney said:

(Continued on following page)

An intent to repeal an earlier statute, like legislative intent generally, must be apparent from the language of the new statute itself. This Court has plainly stated that "an implied repeal must ordinarily be evident from the language or operation of a statute." *Kremer v. Chemical Const. Corp.*, 456 U.S. 461, 470 (1982). It is not uncommon for "the language or operation of a statute" to differ significantly from the expressed opinions of its supporters. Answering a contention that the drafters of one statute would have been surprised by its breadth, this Court replied, "Congress' 'inklings' are best determined by the statutory language that it chooses, and the language it chose here extends far beyond the limits drawn by the Court of Appeals." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n.13 (1985). Here, the language Senator Baker chose may have been narrower than he and Senator Bayh thought, but that does not authorize this Court to disregard the rules of statutory construction by elevating their conversation above the statutory language itself.

The rules of construction begin with statutory language because Members of Congress vote on that language, not on colloquies between their colleagues. This Court presumes "that Congress legislates with knowledge of our basic rules of statutory construction," *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991), and

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> Mr. Speaker, let us assume that the State Legislature of Nebraska could not agree upon new boundary lines by March 15. This bill says that the State of Nebraska Representatives cannot run at large, and the Federal courts have ruled that we must run at large. We are at an impasse.

Id., at 34,037. Representative Denney, at least, did not view the language as having any effect on courts.

one of those rules, as expressed in *Morton v. Mancari*, *supra*, is that implied repeals are not favored. This Court also presumes that Congress knows existing law, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998), and any Member who had paid the slightest attention to the efforts over the previous months to repeal § 2a(c)(5) would certainly have been aware of its existence. Finally, this Court is conscious of the effect of its own prior decisions: "When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary." *Williams v. Taylor*, 529 U.S. 420, 434 (2000). In *Smiley* this Court had considered a previous statute requiring election by districts, but it had found that language to be fully consistent with other statutory language and remedial decrees requiring the election of some Representatives at large. For this Court to disregard its prior result in *Smiley* would require more "specific direction to the contrary" than a brief and confused conversation between Senator Bayh and Senator Baker.

Applying the standard rules of statutory construction to the adoption of § 2c, it is impossible to find "a clearly expressed congressional intention," *Morton*, *supra*, 417 U.S at 551, to repeal § 2a(c)(5). That statute remains in effect, and this Court must now determine its proper effect on the judgment in this case.

II. A REMEDIAL ORDER IN A CONGRESSIONAL REDISTRICTING CASE MUST BE CONSISTENT WITH § 2a(c)(5).

All parties and all amici agree that the District Court acted with proper authority in enjoining the enforcement

of Mississippi's old five-district plan for elections to the House of Representatives, Miss. Code Ann. § 23-15-1037 (Rev. 2001). App. 2a. Likewise, there is common agreement that any remedial judgment entered in such circumstances must be consistent with applicable federal statutes. For instance, this Court in *Abrams v. Johnson*, 521 U.S. 74, 96 (1997), required adherence to standards set by § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c. Moreover, intervenors and the United States argue that § 2c must be enforced by remedial decrees. Brief for the United States at 9-12; Cross-Appellees' Brief at 13-15. Accordingly, if § 2c did not repeal § 2a(c)(5), there can be no real dispute that remedial decrees should comply with § 2a(c)(5), to the extent that statute applies.[3] The real question before this Court, then, is how, if at all, § 2a(c)(5) applies to the facts of this case.

As an initial matter, § 2c does not apply here for two reasons. First, as previously explained, Cross-Appellants' Brief at 15-16, § 2c is directed to legislatures, not courts.[4]

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[3] Under the circumstances of this case, then, there is no need to determine whether Congress intended to create a private right of action under either § 2c or § 2a(c). *Compare* Cross-Appellants' Brief at 25 n.14 *with* Cross-Appellees' Brief at 14 n.3. All parties agree that the District Court had authority to issue a remedial order and that the order should have been consistent with whatever statutes may be applicable.

[4] The argument of the United States to the contrary is based on its analysis of the term "established law," Brief for the United States at 11-12, not the language actually chosen by Congress in 1967. By contrast, the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, uses the same phrase as § 2c in requiring that federal offices "shall be established by law." This Court has noted regarding that phrase:

> [T]he Framers added language to both halves of the Appointments Clause specifically to address the concern that the President might attempt unilaterally to create and fill

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Indeed, as demonstrated earlier, *supra*, at 5 & n.2, some Members during the debate read § 2c as having no application to courts. Second, to the extent § 2c also applies here, the specific language of § 2a(c)(5) must be enforced, because "a more specific statute will be given precedence over a more general one." *Busic v. United States*, 446 U.S. 398, 406 (1980). That is exactly what this Court did in *Koenig v. Flynn, supra,* when it enforced the at-large election requirement of § 4 of the 1911 statute notwithstanding the general requirement of § 3 that Representatives be elected by districts.

As for § 2a(c)(5), the United States argues that, even if it has not been repealed, it does not apply here because

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federal offices. See C. Warren, The Making of the Constitution 642 (1937) (discussing references in the Appointments Clause to principal offices " 'established by Law,' " and to the power of appointing inferior officers which " 'Congress may by law' " vest as specified).

Weiss v. United States, 510 U.S. 163, 187 n.2 (199). his Court has similarly noted that officials appointed by co ts are not "established by law", which means established by statute:

> The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. See *Burnap v. United States*, 252 U.S. 512, 516-517 (1920); *United States v. Germaine*, 99 U.S. 508, 511-512 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute.

Freytag v. C.I.R., 501 U.S. 868, 881 (1991). If "shall be established by law" in the Appointments Clause allows only legislative, and not judicial or executive, creation of offices, "shall be established by law" in § 2c similarly allows only legislative, and not judicial or executive, creation of districts.

"the State was 'redistricted in the manner provided by the law thereof' by virtue of the federal court order in this case." Brief for the United States at 11 n.4. There are two problems with this argument. First, while each State is undoubtedly bound by federal law, the natural reading of "the law thereof" refers to the law of each State, not the law of the federal government. Indeed, then-Justice Rehnquist appeared to read to the statute as referring to state law in his opinion in *Republican Nat'l Committee v. Burton*, 455 U.S. 1301, 1302 n.* (Rehnquist, J., in chambers), *appeal dismissed & cert. denied*, 456 U.S. 941 (1982).[5] Second, at the time the District Court rendered its judgment, Mississippi had not been redistricted in the manner provided by any law, state or federal. Thus, when the District Court was deciding the case, § 2a(c)(5) still applied by its terms and should have been followed.

By the same token, § 2a(c) has no application whatsoever after "a State is redistricted in the manner provided by the law thereof." The plain language of the statute indicates that, once a legislature has adopted a new plan, the five options listed in the statute have no further legal effect. Thus, there is no basis for the fear expressed by the United States and intervenors that legislatures might try to evade § 2c by adopting statutes requiring the election of some or all Representatives at large. Brief for the United States at 27; Cross-Appellees' Brief at 15. There is no evidence that any legislature has ever disregarded the

[5] Similar language in the general criminal jurisdiction statute, 18 U.S.C. § 3231, indisputably refers to state, not federal, law: "Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof."

clear command of Congress,[6] and, even if one did, § 2a(c) would not restrict the remedial authority of the federal courts after a legislature had completed the redistricting procedure required by its law.

Intervenors and the United States argue that the fifth clause of § 2a(c) should not be applied because some of the other clauses may be presently unenforceable. Brief for the United States at 27-29; Cross-Appellees' Brief at 11-12. Any difficulty in enforcing the earlier clauses, however, arises, not from incompatibility with § 2c, but from this Court's constitutional decisions after 1941.[7] Indeed, the retention of existing districts where there has been no change in the number of Representatives, as required by § 2a(c)(1), is fully consistent with § 2c, even where population shifts may have rendered their populations unequal. Congress in 1967 was well aware of the complications created by this Court's redistricting jurisprudence, and it had developed comprehensive plans to address those problems; it simply refused to enact any of them. *See* Cross-Appellants' Brief at 18-19. In declining to act,

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[6] As previously discussed, Cross-Appellants' Brief at 11-12, some legislatures did require Representatives to be elected at large in the years after this Court announced in *Wood v. Broom*, *supra*, that the statutory requirement of election from districts had expired. However, no legislature has repeated that practice since § 2c took effect.

[7] Of course, there is no decision of this Court directly applying those principles to an act of Congress. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), this Court invalidated state statutes for failure to comply with the equal population requirement of Art. I, § 2, but there is no case which invalidates election procedures required by Congress acting under the power delegated by Art. I, § 4. That issue need not be addressed in this case, because no party suggests that § 2a(c)(5) is unconstitutional.

Congress was certainly aware that § 2a(c)(5) might require some States to elect their entire delegations at large, but it may also have been satisfied that such threats in the past had always produced a redistricting compromise. *See* Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv.L.Rev. 1057, 1087-88 (1958). Whatever subjective intentions or expectations Members of Congress may have had, the fact remains that the enactment of § 2c did not remove any of the provisions of § 2a(c) from the books.

Finally, intervenors contend that Congress intended to subordinate § 2a(c)(5) to the requirements of § 2 and § 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973c. Cross-Appellees' Brief at 16-17. The United States does not support intervenors' suggestion that the failure of a State to act must be reviewed under § 5 before federal law can be enforced. That question need not be resolved here, because the Attorney General reviewed and approved exactly the same decision when Miss. Code Ann. § 23-15-1039 (Rev. 2001), requiring elections at large when Mississippi loses a seat and fails to redistrict, was reenacted in 1986. 1986 Miss. Gen. Laws ch. 495, § 308. Because the Attorney General has already expressly approved Mississippi's decision to elect Representatives at large, as § 2a(c)(5) requires, there is no need for further review under § 5. In addition, not only did intervenors fail to prove that such elections would violate § 2, they present no reason to suppose that Congress intended its own enactments to be subject to challenge under § 2.[8] Absent

[8] The statutes considered here and the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg *et seq.*, considered in *Young v. Fordice*, 520 U.S. 273 (1997), are not the only instances in which Congress has

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any indication that Congress intended § 2 as a mechanism to avoid enforcement of its own enactments, § 2a(c)(5) should have been followed by the District Court.

In short, neither the United States nor intervenors offer any reason why the District Court's remedial judgment should have disregarded § 2a(c)(5). That statute remains in effect, and the District Court erred in entering a judgment which precludes Mississippi from complying with it. Because both federal law and Mississippi law, properly approved by the Attorney General under § 5, provide for Representatives to be elected at large under these circumstances, the District Court's judgment should be reversed.

CONCLUSION

For the reasons stated herein and in their original brief, plaintiffs and the Mississippi Republican Executive Committee ask this Court to reverse the judgment of the District Court and to remand for entry of a judgment requiring the defendants to conduct elections for

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imposed election duties on the States. For instance, the question of the proper enforcement of the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §§ 1973ff *et seq.*, is presently presented to this Court by the petition for certiorari pending in *Forrester v. New Jersey Democratic Party, Inc.*, No. 02-555.

Mississippi's Representatives in accordance with 2 U.S.C. § 2a(c)(5).

Respectfully submitted,

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In the Supreme Court of the United States

JOHN ROBERT SMITH, ET AL., CROSS-APPELLANTS

v.

BEATRICE BRANCH, ET AL.

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING CROSS-APPELLEES

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QUESTION PRESENTED

Whether 2 U.S.C. 2a(c)(5) required the district court in this case to order at-large elections to remedy the State's failure to enact an enforceable congressional districting plan.

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In the Supreme Court of the United States

No. 01-1596

JOHN ROBERT SMITH, ET AL., CROSS-APPELLANTS

v.

BEATRICE BRANCH, ET AL.

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING CROSS-APPELLEES

INTEREST OF THE UNITED STATES

The cross-appeal challenges the authority of a district court under 2 U.S.C. 2a(c)(5) and 2c to create districts for congressional elections when a State has failed to create congressional districts itself. The Attorney General is charged with enforcement of the requirements of the Voting Rights Act of 1965, 42 U.S.C. 1973 *et seq.* See, *e.g.*, 42 U.S.C. 1971(c), 1973j, 1973aa-2, 1973ee-4. Pursuant to that authority, the Attorney General may bring suit to enjoin enforcement of congressional districting plans that violate the Act. The United States has an interest in avoiding an interpretation of Sections 2a(c)(5) and 2c that would unduly restrict the remedial authority of federal courts in cases under the Voting Rights Act.

STATEMENT

1. Article I, Section 2 of the United States Constitution requires that the "House of Representatives shall be composed of Members chosen every second Year by the People of the several States." Section 4 of Article I further provides that the "Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of chusing Senators."

Pursuant to its authority under the final clause of Article I, Section 4, Congress has from time to time enacted statutes governing various aspects of congressional elections. In 1929, Congress enacted the current statutory scheme governing apportionment of the House of Representatives after the decennial census, and in 1941, Congress amended it by adding 2 U.S.C. 2a(c). Section 2a(c) addresses the election of Representatives after a reapportionment. It provides:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner:
>
> (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected;
>
> (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at

large and the other Representatives from the districts then prescribed by the law of such State;

(3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State;

(4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or

(5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. 2a(c). Because Mississippi lost one Representative after the 2000 census, the cross-appeal in this case concerns the final clause of the statute, 2 U.S.C. 2a(c)(5).

In 1967, 26 years after Section 2a(c) was enacted, Congress passed 2 U.S.C. 2c, which generally mandated that Members of the House of Representatives were to be elected in single-member districts. It provides:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of

> this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. 2c.

2. After the 2000 census, the Mississippi State Legislature failed to pass a districting plan to take into account the State's loss of one seat in the House of Representatives. Cross-appellant and others filed suit before a federal three-judge court. They claimed that Mississippi's prior districting statute was unenforceable. As later amended, they also claimed that a districting plan ordered by a state court in litigation instituted by cross-appellees had to be enjoined, both because it had not been precleared under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, in time for use in the upcoming congressional elections, and because use of such a court-ordered plan for congressional elections would violate Article I, Section 4 of the Constitution. Cross-appellants therefore asked the federal court to draw up its own redistricting plan or order at-large elections pursuant to 2 U.S.C. 2a(c)(5).

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[1] The parenthetical clause was designed to permit Hawaii and New Mexico, which had never elected their representatives from districts, to elect their two Representatives at large in the 1968 election before moving to a single-member-district plan in 1970. See p. 16, *infra*.

The district court agreed that the State did not have a valid plan and that the state-court plan could not be used, both because it had not been precleared and because its use would violate Article I, Section 4. On February 26, 2002, the court enjoined the State from using either the prior districting statute or the state-court plan. The holding that the state-court plan was not precleared and would be unconstitutional is the subject of the main appeal in this case. J.S. App. 1a-3a. As a remedy, the district court did not order at-large elections, but instead issued its own redistricting plan. *Ibid.* That decision is the subject of this cross-appeal.

SUMMARY OF ARGUMENT

The district court did not abuse its equitable discretion in developing interim congressional districts under the single-member-district command of 2 U.S.C. 2c and the consistent instructions of this Court, rather than ordering at-large elections under 2 U.S.C. 2a(c)(5). Cross-appellants' argument that the single-member-district mandate of Section 2c did not supersede Section 2a(c)(5) in cases like this would eviscerate the important congressional policy and terms of Section 2c.

The language of Section 2c provides that "there shall be established by law" single-member congressional districts in any State entitled to more than one Representative and that "Representatives shall be elected only from districts so established." That language is clear and unambiguous. This Court has consistently understood that courts, as well as legislatures, "establish law," and the terms of the statute thus govern any entity—judicial or legislative—responsible for fashioning plans for electing Representatives.

Moreover, the history of Section 2c demonstrates that Congress intended in 1967, when that provision

was enacted, to set forth a broad and general command that was *particularly* addressed to the courts that at that time were deeply engaged in the redistricting process. In the preceding few years, several courts had threatened to order at-large election of a State's entire congressional delegation if the State legislature could not enact a districting plan that complied with one-person, one-vote requirements. Those judicial decisions provided the backdrop against which Congress legislated. Although there was no committee report on the legislation, the debates in both the House and Senate repeatedly and specifically referred to the role of the courts in redistricting, the fear of court-ordered at-large elections, and the elimination of that threat through the enactment of Section 2c. By contrast, the debates do not evince any specific fear of the unlikely prospect that a legislature outside of Hawaii and New Mexico would require at-large elections. Accordingly, the context reinforces what the text of Section 2c makes clear: Congress eliminated at-large elections—regardless of their source—for the House of Representatives except perhaps in the most unusual circumstances.

The courts have consistently understood that Section 2c governs judicial action. All of the courts to address the interaction of Sections 2c and 2a(c) have agreed that the single-member-district mandate of Section 2c is controlling, at least where its mandate is practicable. Although Section 2a(c) retains validity as a "stop-gap" measure in a case in which exigencies of time make single-member districting impossible, no court has applied Section 2a(c) to order at-large election of Representatives since Section 2c was enacted.

Finally, overturning the settled authority requiring courts to use single-member-district remedial plans,

rather than ordering at-large elections, would have a series of exceptionally odd consequences. Under cross-appellants' theory, if a legislature in the position of Mississippi here enacted a law providing for at-large elections of the State's congressional delegation, a court would have to strike it down as a violation of Section 2c, but then would presumably be compelled by Section 2a(c)(5) to order the same at-large elections as a remedy. Moreover, the checkerboard coverage of Section 2a(c) would be exceedingly strange in States that were unable to redistrict themselves after a decennial apportionment. If the State kept the same number of seats, the district court would have to draw new districts. If the State added seats, the district court would draw new districts corresponding to the old number of seats, while ordering the new seats to be elected at large. If the State lost seats, the district court would have to order at-large elections for the entire delegation, even if that led to dozens of seats being filled in a chaotic at-large election. Congress enacted the single-member-district mandate of Section 2c to avoid that kind of electoral roulette, and Congress's mandate should be enforced.

THE DISTRICT COURT WAS NOT REQUIRED BY 2 U.S.C. 2a(c)(5) TO ORDER AT-LARGE ELECTIONS

A. A District Court Has Remedial Authority To Impose A Congressional Districting Plan

The district court in this case enjoined enforcement of the state-court plan, which provided for four districts from which to elect the Representatives to which Mississippi was entitled pursuant to the 2000 census, both on the ground that it had not been precleared under Section 5 and because it violated Article I, Section 4 of the Constitution. The State's prior five-

district plan was obviously unenforceable, because it did not comport with the 2000 apportionment, under which Mississippi lost one Representative. That left the State with no plan under which to elect the Representatives to which the State was entitled.

This Court has generally addressed the steps a district court should take in that situation. The Court has long made clear that a district court's remedial authority in such a case includes the power to issue a redistricting plan. See, *e.g.*, *Abrams* v. *Johnson*, 521 U.S. 74, 86 (1997); *Upham* v. *Seamon*, 456 U.S. 37, 41 (1982); *White* v. *Weiser*, 412 U.S. 783, 794-795 (1973). Moreover, the Court has recognized that, although a court has remedial discretion in that context, when courts "are put to the task of fashioning reapportionment plans * * *, single-member districts are to be preferred absent unusual circumstances." *East Carroll Parish Sch. Bd.* v. *Marshall*, 424 U.S. 636, 639 (1976); accord *Chapman* v. *Meier*, 420 U.S. 1, 17-19 (1975); *Mahan* v. *Howell*, 410 U.S. 315, 333 (1973); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Connor* v. *Johnson*, 402 U.S. 690 (1971).[2]

Moreover, in cases such as this involving elections to the House of Representatives, Congress has enacted a statute requiring the use of single-member districts, rather than multi-member districts or at-large elections. Congress has provided in 2 U.S.C. 2c that in each State "there shall be established by law a number of districts * * * and Representatives shall be elected

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[2] Courts should also comply with Sections 2 and 5 of the Voting Rights Act in fashioning remedial plans. See *Abrams* v. *Johnson*, 521 U.S. 74, 90, 95-96 (1997).

only from districts so established."[3] That statute expresses a clear and unequivocal congressional requirement that Members of Congress should be elected from single-member districts. In this case, having found that Mississippi did not have a valid districting plan, the district court proceeded to do precisely what this Court's instructions and the command of Section 2c dictate: it issued an injunction requiring that Representatives be elected in accordance with a districting plan. It thereby "established by law" a single-member district plan, just as Section 2c requires.

B. Cross-Appellants' Construction Of Section 2a(c)(5) To Preclude Judge-Made Congressional Districting Plans Disregards The Plain Language Of Section 2c And Is Inconsistent With Its History And Consistent Judicial Construction

Cross-appellants' central contention is that, notwithstanding the command of Section 2c and this Court's consistent pronouncements, the federal district court's equitable authority was restricted by 2 U.S.C. 2a(c)(5), which provides that "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment * * * if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Repre-

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[3] Similar districting requirements had been periodically included in apportionment legislation from 1842 through 1911. See Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491; Act of July 14, 1862, ch. 170, 12 Stat. 572; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28; Act of Feb. 25, 1882, ch. 20, § 3, 22 Stat. 5; Act of Feb. 7, 1891, ch. 116, § 3, 26 Stat. 735; Act of Jan. 16, 1901, ch. 93, § 3, 31 Stat. 733; Act of Aug. 8, 1911, ch. 5, § 3, 37 Stat. 13. After the districting requirement in the 1911 Act expired, Congress failed to include a similar provision in the subsequent apportionment act of 1929. See Act of June 18, 1929, ch. 28, 46 Stat. 21; *Wood* v. *Broom*, 287 U.S. 1 (1932).

sentatives, they shall be elected from the State at large." Accordingly, in a case like this in which the state legislature neither drew congressional districts itself nor enacted a law providing for some other manner of drawing such districts, cross-appellants argue that a court has no authority to draw such a plan. Instead, under cross-appellants' theory, all a court can do is to order that congressional elections be conducted on an at-large basis.

1. Cross-appellants' theory is mistaken, because it fails to give full scope to the later-enacted Section 2c. As discussed above, the command of Section 2c is unambiguous and requires that single-member districts "shall be established by law" and that "Representatives shall be elected only from districts so established." 2 U.S.C. 2c. Contrary to that mandate, cross-appellants would have district courts require States in the situation here to elect all of their Representatives at-large. While cross-appellants are correct (Br. 13-15) that repeal by implication is disfavored, so is failure to give a later-enacted statute the full scope that its terms require. See, *e.g.*, *Gordon* v. *New York Stock Exch., Inc.*, 422 U.S. 659, 685 (1975); *United States* v. *Yuginovich*, 256 U.S. 450, 463 (1921); *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 92 (1870). In unusual cases in which exigencies of time make Section 2c's single-member district mandate impossible to satisfy, Section 2a(c)(5) retains validity as a "stop-gap" measure to avoid the entire loss of a State's representation in Congress. But in cases in which its mandate is possible to satisfy, Section 2c requires single-member districts.

Cross-appellants argue (Br. 15) that Section 2a(c)(5) and Section 2c can be reconciled by construing Section 2c's requirement that single-member districts shall be "established by law" to "refer to legislation, not to any

form of litigation." They assert (Br. 17) that "[o]n its face, § 2c is addressed, not to the courts, but solely to the lawmaking authority."[4]

Cross-appellants' contention is mistaken. The terms "established by law" comfortably encompass judicial decisions, as well as legislative decisions. For example, the federal habeas statute precludes habeas relief for a state prisoner based on a claim adjudicated in state-court proceedings "unless the adjudication of the claim * * * resulted in a decision that was contrary to, or involved an unreasonable application of, clearly *established Federal law*, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1) (emphasis addded). See *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000). The "law" that must be "clearly established" under that provision ordinarily refers to judicial decisions—in particular, those of this Court. In other contexts as well, the term "established law" frequently includes—or even has as its primary referent—judicial decisions. See, *e.g.*, *Hope* v. *Pelzer*, 122 S. Ct. 2508, 2516 (2002) ("established law"); *Swidler & Berlin* v. *United*

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[4] A more plausible reconciliation than that offered by cross-appellants would be simply to construe the term "in the manner provided by the law thereof" in the opening "unless" clause of Section 2a(c) to refer to any law binding on the State—including, in particular, federal law, which is binding on the States under the Supremacy Clause. U.S. Const. Art. VI ("[T]he Laws of the United States * * * shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby."). This Court's decisions "have repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign." *Testa* v. *Katt*, 330 U.S. 386, 391 (1947). If Section 2a(c) were construed in that manner, then, in the terms of the "unless" clause of Section 2a(c), the State was "redistricted in the manner provided by the law thereof" by virtue of the federal court order in this case, and Section 2a(c)(5) is simply inapplicable.

States, 524 U.S. 399, 407 (1998) ("established law"); *United States* v. *Frady*, 456 U.S. 152, 156 (1982) ("long-established law"); *Franks* v. *Delaware*, 438 U.S. 154, 165 (1978) ("established law"); *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967) ("established law") (per curiam); *McCrary* v. *Illinois*, 386 U.S. 300, 313 (1967) ("established law"); *Tehan* v. *Shott*, 382 U.S. 406, 409 (1966) ("established law").

3. The historical context and legislative history of Section 2c confirm, as the statutory text indicates, that Congress understood that congressional electoral plans could be "established by law" pursuant to court orders as well as legislation. The context and history demonstrate that Congress specifically intended Section 2c to require courts to construct single-member districts rather than ordering at-large elections.

The question of what constraints to place on state legislatures after a reapportionment had simmered for decades, since Congress had failed to enact legislation following the 1920 census. See *Wood* v. *Broom*, 287 U.S. 1, 6 (1932). But when Congress enacted Section 2c in 1967, the immediate issue was the involvement of the courts in fashioning electoral plans. The Voting Rights Act of 1965, with its assignment to the federal courts of jurisdiction to involve themselves in elections, had only recently been enacted. Even more significant, this Court's decisions in *Baker* v. *Carr*, 369 U.S. 186 (1962), *Wesberry* v. *Sanders*, 376 U.S. 1 (1964), and *Reynolds* v. *Sims*, 377 U.S. 533 (1964), had ushered in a new era in which federal courts were overseeing efforts by badly malapportioned States to conform their electoral practices—including their congressional electoral practices —to constitutional one-person, one-vote standards. The risk arose that federal courts forced to fashion remedies for one-person, one-vote violations would order at-large

elections of large numbers of Representatives. It was precisely in that highly charged context, in which the role of courts in redistricting was at the center of public and congressional attention, that Congress enacted Section 2c and directed its mandate at any entity—but in particular at courts—responsible for drawing congressional districts.

a. At the time Congress enacted Section 2c, at least six district courts, two of them specifically invoking Section 2a(c)(5), had stated that, if the state legislature was unable to correct malapportioned congressional districts, the court would order the State's entire congressional delegation to be elected at large. In *Grills* v. *Branigin*, 255 F. Supp. 155 (S.D. Ind. 1966), rev'd, 385 U.S. 455 (1967), a three-judge court had held Indiana's 1941 congressional districting plan unconstitutional, but held that a new plan adopted in 1965 satisfied constitutional one-person, one-vote standards. In *Duddleston* v. *Grills*, 385 U.S. 455 (1967), this Court summarily reversed in light of its previous one-person, one-vote cases, indicating that the population deviation even in the 1965 plan was unconstitutional. Indiana, which had been entitled to 11 Representatives since the 1940 census, accordingly had no valid plan for that number of districts, because the State's pre-1941 plan would have been for the twelve seats to which it was entitled after the 1930 census. As a result, the State faced the very real prospect that a situation precisely analogous to that in Section 2a(c)(5) would arise, and the court would order at-large elections of the entire eleven-person delegation.

On February 3, 1965, a three-judge district court in Arkansas, whose House delegation had decreased from six to four Members after the 1960 census, stated that under Section 2a(c)(5), "if the Legislature * * * had

taken no action [after the 1960 apportionment] the congressmen would have been required to run at large," and that the same reasoning would compel the court to require at-large elections if the legislature were unable to correct its malapportioned congressional districts. *Park* v. *Faubus*, 238 F. Supp. 62, 66 (E.D. Ark. 1965). On August 5, 1966, a three-judge court in Missouri, whose House delegation had decreased from eleven to ten Members after the 1960 census, had informed the State that if it were unable to redistrict in accordance with the Constitution, pursuant to the "command of Section 2a(c)[(5)]," "the congressional elections for Missouri will be ordered conducted at large until new and constitutional district are created." *Preisler* v. *Secretary of State of Mo.*, 257 F. Supp. 953, 981, 982 (W.D. Mo. 1966), aff'd 385 U.S. 450 (1967). See *Preisler* v. *Secretary of State of Mo.*, 279 F. Supp. 952, 968 (W.D. Mo. 1967) (later opinion repeating that court had based its ruling on Section 2a(c)(5)), aff'd, 394 U.S. 526 (1968).

In *Bush* v. *Wartin*, 251 F. Supp. 484, 490 & n.17 (S.D. Tex. 1966), a three-judge court in Texas had told the Texas legislature that, if it did not enact districting legislation that complied with one-person, one-vote standards, the court would order the entire 23-person Texas delegation to be elected at large. See also *Meeks* v. *Anderson*, 229 F. Supp. 271, 273-274 (D. Kan. 1964) (recognizing that such relief could be "appropriate" for Kansas, which had lost one seat in 1960 apportionment); *Calkins* v. *Hare*, 228 F. Supp. 824, 830 (E.D. Mich. 1964) (same for Michigan, which had lost one seat in 1960 apportionment); cf. *Wells* v. *Rockefeller*, 273 F. Supp. 984 (S.D.N.Y.) (holding districts in New York, which had lost two seats in 1960 apportionment, unconstitutional but abstaining from ordering relief), aff'd, 389 U.S. 421 (1967); *Baker* v. *Clement*, 247 F.Supp. 886, 897-

898 (M.D. Tenn. 1965) (holding districts in Tennessee unconstitutional and mentioning possibility of at-large elections, but abstaining from issuing relief); *People* v. *Kerner*, 208 N.E. 2d 561, 566-567 (Ill. 1965) ("Should the General Assembly fail to redistrict, the task must be performed by some other agency *or an at large election held* for all representatives in Congress.") (emphasis added).

b. The congressional debates make quite clear that Congress was vitally concerned that courts—such as those in the above cases and others in unreported current decisions and in the future—could order at-large elections of Representatives. No participant in the debates expressed any specific concern that a legislature outside Hawaii and New Mexico, as opposed to the courts, would provide for at-large elections, although there was general agreement that the best solution was simply to require, once and for all, the election of Representatives in single-member districts.

Senator Birch Bayh of Indiana—where the *Grills* litigation had threatened at-large elections of the entire House delegation—introduced what was to become Section 2c in the Senate on November 8, 1967, as a rider to a private immigration bill. 113 Cong. Rec. 31,718. Senator Bayh stated that he hoped to take from an extensive congressional redistricting bill one part "over which there was no dispute, or a minimal amount of dispute, and attach that part" to the pending immigration bill. *Id.* at 31,719.[5] As introduced, the bill excluded

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[5] Cross-Appellants attempt (Br. 18-19) to draw significance from the fact that Congress previously failed to pass legislation that would have explicitly replaced Section 2a(c) with the new districting requirements for House elections. The legislative history, however, demonstrates that those measures failed because they contained controversial provisions purporting to set mathe-

New Mexico and Hawaii, two States that had never had congressional districts and had elected their two Representatives at large. *Ibid.* Senator Bayh explained that, "if [Hawaii and New Mexico] are excluded from the overall coverage, it can pass the House and we can get a prohibition of at-large elections, which we all believe is necessary." *Ibid.*

After the bill was introduced, Senator Baker almost immediately offered an amendment that eliminated the exclusion for Hawaii and New Mexico and eliminated as well an additional provision that would have made clear that the new law did not require States to reconfigure existing districts until the 1970 census data were available. See 113 Cong. Rec. at 31,718. Senator Baker's amendment was accepted by the Senate. See *id.* at 31,720. Both bills otherwise prohibited at-large elections using almost identical language. *Ibid.* One difference, however, led to an important colloquy

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matical standards for population disparities between districts. See, *e.g.*, 113 Cong. Rec. at 31,696 (statement of Sen. Ervin); *id.* at 31,701 (statement of Sen. Baker); *id.* at 34,366 (statement of Sen. Bayh); S. Rep. No. 291, 90th Cong., 1st Sess. 9-26 (1967). In a final effort to salvage some portion of the legislation, Senators Baker and Bayh extracted a single provision of the overall legislation and attached it to the pending immigration bill. See, *e.g.*, 113 Cong. Rec. at 31,701 (statement of Sen. Baker); *id.* at 31,718 (statement of Sen. Baker); *id.* at 31,719 (statement of Sen. Bayh). The debates preceding the passage of that single provision, which became 2 U.S.C. 2c, demonstrate that Congress believed that Section 2c would be as effective in precluding at-large elections as the prior versions of the bill that included an explicit repeal of Section 2a(c). Cf. 113 Cong. Rec. at 11,073 (colloquy between Sens. Brademas and Cellar regarding predecessor version preventing court-ordered at-large elections); *id.* at 31,720 (colloquy between Sens. Baker and Bayh regarding final version preventing court-ordered at-large elections).

regarding the application of Section 2c to redistricting by courts. Senator Bayh's version required that "there shall be established a number of districts" for House elections, while Senator Baker's version required that "there shall be established *by law* a number of districts." *Ibid.* (emphasis added).

In that connection, Senator Bayh stated that he "would interpret 'by law' to mean if the reapportionment is done either by the State legislatures or by the court," and he asked whether Senator Baker "agrees with that interpretation." 113 Cong. Rec. at 31,719. Senator Baker responded that "in the ordinary course of events, it is clearly the province of the State legislature to [redistrict]" and that "only if State legislatures failed in their performance of that duty that there would be any derivative right of the judiciary, Federal, or State, to intervene." *Ibid.* The colloquy continued, with Senator Bayh noting that "if it is bad government for the legislature to say that Congressmen should run at large, then it is bad government for the court to have an entire group of Congressmen running at large in a State." *Ibid.* Senator Baker agreed, explaining that "in Tennessee, * * * the legislature was not able to agree on redistricting, and the Federal judiciary undertook to redistrict, did so." *Id.* at 31,719-31,720. He concluded:

> If we should fall on those unhappy circumstances, I would greatly prefer that the judiciary, State or Federal, designate individual single-Member districts; running at large never really accommodates the principle of equal representation. It never really accommodates the idea that the House of Representatives is properly made up of Representatives of districts of varying interests.

Id. at 31,720. So as to leave no ambiguity, the two Senators had the following colloquy:

> Mr. Bayh. Perhaps I was not clear in the first question. Let me rephrase the question in light of the colloquy.
>
> When we say "as amended, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative," we are talking about either of two situations—whether the legislature reapportions or whether the court reapportions.
>
> Mr. Baker. The Senator is correct.

Ibid. Immediately following that exchange, the Senate agreed to Senator Baker's substitute amendment. There was one final exchange that made the same point:

> Mr. Bayh. * * * This will make it mandatory for all Congressmen to be elected by single-Member districts, whether the reapportionment is done by State legislatures or by a Federal Court.
>
> Mr. Baker. That is my understanding.

Ibid. The Senate debate is inconsistent with cross-appellants' contention that Section 2c's mandate for single-member districts was not directed at the courts.

c. The House considered the bill on November 28, 1967. Most of the controversy generated by the bill resulted from questions about the propriety of the Senate's decision to attach the bill to a non-germane

private immigration bill and from a heated dispute about whether a temporary exception, valid only for the 1968 elections, should be included for Hawaii and New Mexico. 113 Cong. Rec. at 34,034-34,038. Two points, however, are clear from the debate, and both of them belie cross-appellants' theory that Section 2c's mandate was directed at legislatures and not at courts. First, the House Members viewed the central problem facing them as the risk of at-large congressional elections caused by judicial decisions holding States to be malapportioned and the consequent risk that, if legislatures could not agree on districting plans, *courts* would order at-large elections. Second, the House viewed the bill as providing a solution to that problem by prohibiting at-large congressional elections entirely—whether ordered by a court or required by a legislature.

For example, Congressman Celler referred to the possibility that, due to the *Grills* litigation in Indiana, a court might order all eleven Members of the House from Indiana to face at-large election under Section 2a(c)(5). 113 Cong. Rec. at 34,034 ("Unless [the bill] is adopted, there may be unfortunate effects upon the State of Indiana. * * * At the importunities of the Members from the great State of Indiana, it was thought that we should prohibit election of Members at large."). Congressman Celler was clear about the effect of Section 2c: the bill "in essence, provides that there can be no election of a Representative at large. * * * If it prevails, there will be no more elections of Representatives at large forever." *Ibid.*

Congressman Smith agreed that "[t]he language in the private bill will prohibit any State from running at large in any future elections," although he favored the exception for Hawaii and New Mexico. 113 Cong. Rec. at 34,035. He also noted the difficulty that could occur

in his home State of California, which was under court order to redistrict, but whose legislature was having difficulty agreeing on a plan: "If the legislature cannot do it, then it might be a question of the Supreme Court not being able to do it either. * * * If the 38 Representatives in California have to run at large, it could be disastrous to the State." *Ibid.* Congressman McClory, similarly referred to "the problem you have in California and perhaps in other large States where the State is under compulsion of an order of the State court or decisions of the Supreme Court." *Ibid.* Congressman Denney noted that "just last Wednesday a three-judge panel ruled that the State of Nebraska [his home State] was not properly districted and that the legislature must redistrict * * * prior to March 15, or the three representatives of that great State would have to run at large." *Id.* at 34,037. Congressman Jacobs of Indiana noted that the State delegation "faces the very serious threat of running at large, * * * which * * * would * * * produce utter chaos," and supported the bill on the ground that "[i]f this bill should become law, then in any State whose districts are declared unconstitutional a court could draw district lines." *Ibid.* Congressman Pepper added that if the bill did not pass, "we do not know how many States in the Union would, either by the action of their courts or their legislatures, have to have elections of House Members-at-Large." *Ibid.* The bill ultimately passed, with an amendment excluding Hawaii and New Mexico for the 1968 elections only. *Id.* at 34,028.

d. On November 30, 1967, the Senate passed the bill as amended by the House. 113 Cong. Rec. at 34,369-34,370. Again, the controversy centered on the exclusion of Hawaii and New Mexico, and the debate demonstrated the Senate's continuing and specific concern

with the possibility of court-ordered at-large elections and its decision to eliminate that possibility by requiring once and for all that Representatives be elected from single-member districts, regardless of whether the legislature or the court is responsible for the electoral plan.

Senator Fong, who supported the House amendment excepting Hawaii and New Mexico, explained that the exception would apply only to the 1968 election and that "[b]eginning with the elections in 1970, no State will elect any Congressman at large. That is the substance of this bill." 113 Cong. Rec. at 34,364. See *ibid.* ("Beginning with the 1970 elections, and for every congressional election thereafter, every State of the Union, with no exception, must elect its Congressman from single-member districts."). In debating the exception, Senators Allott and Hruska, who objected to the exclusion, specifically referred to the burdens that had been imposed on other States by court-ordered redistricting, *id.* at 34,366; see also *id.* at 34,369 (statement of Sen. Brooke to same effect), as did Senator Holland, who supported the exclusion, *id.* at 34,368.

Senator Bayh also again focused the Senate's attention on the risk of court-ordered at-large elections:

> Well, the reason [the bill] is necessary, quite frankly, is the fact that, in some States, a court has mandated the States to reapportion. There is a great likelihood that, if agreement cannot be reached within a State, the court could well order the entire congressional delegation to run at large.
>
> The purpose of this particular bill is to avoid this possibility.

113 Cong. Rec. at 34,366. He repeated that theme three times more. See *id.* at 34,367 ("[W]e should not allow a Federal court—if you please—require that congressional candidates must run at large."); *ibid.* ("So it is important that we pass this measure now so that the Federal courts do not order elections at large, which could happen in the State of California, for example."); *id.* at 34,369 (describing amended bill as "effort to try to see to it that 48 States are in fact not ordered by a court to have elections at large"). Senator Fong also referred to the imminent risk of court-ordered at-large elections in Indiana. *Id.* at 34,367 ("This bill, as I see it, is framed only for States such as Indiana; under court order to elect their Representatives at large."). Senator Ervin urged passage of the bill because "[i]f we do not do so, we are going to create a situation of chaos next fall, because the Supreme Court will require candidates for Congress in States which do not live up to the one-man, one-vote principle on the basis of the 1960 census to run at large." *Id.* at 34,368. Finally, immediately after the Senate approved the House measure, Senator Mansfield stated that Senator Inouye "demonstrated outstanding skill and ability in handling this proposal that bars at-large congressional elections." *Id.* at 34,370.

4. The language of Section 2c thus comfortably includes courts, as well as legislatures, within its single-member-district mandate, and the text and history of the provision demonstrates that Congress intended to eliminate the possibility that any entity—legislatures and, especially, courts—would order at-large elections to the House. Judicial decisions have consistently reached the same conclusion. Although at least one court has recognized that Section 2a(c)(5) retains vitality in the hypothetical situation in which exigencies of time make the single-member-district command of

Section 2c impossible to satisfy, the courts have uniformly held that the clear mandate of Section 2c was intended to override Section 2a(c)(5) and any other law purporting to justify at-large election of Representatives.[6] Indeed, at least since Section 2c was enacted, no court has applied Section 2a(c)(5) to order at-large elections.[7]

a. The first court to examine Section 2c, just two weeks after that statute was enacted, was the three-judge district court in the Western District of Missouri, which had previously threatened to order at-large elections in accordance with Section 2a(c)(5). In its decision on December 29, 1967, *Preisler* v. *Secretary of State of Mo.*, 279 F. Supp. 952 (W.D. Mo. 1967), aff'd, 394 U.S. 526 (1969), the court reversed its prior position and stated that it would *not* order at-large elections, but would instead fashion a districting plan if the state legislature failed to enact its own plan. The court

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[6] This Court adverted to the issue in *Whitcomb* v. *Chavis*, 403 U.S. 124, 158-159 n.39 (1971). The Court noted "[i]n 1842, Congress by statute required single-member districts for congressional elections," and that "[t]he substance of the restriction was continued * * * until 1929." *Ibid.* The Court then noted that Congress had enacted Section 2a(c). But, the Court explained, "[i]n 1967, Congress reinstated the single-member district requirement." *Ibid.* (citing Section 2c).

[7] This Court has repeatedly approved court-ordered congressional redistricting plans without suggesting that the courts involved should have required at-large elections under Section 2a(c). See *Abrams* v. *Johnson*, 521 U.S. 74 (1997) (redistricting plan for Georgia, which had gained one seat after 1990 census); *Upham* v. *Seamon*, 456 U.S. 37, 41 (1982) (redistricting plan for parts of Texas; State had gained three seats after 1980 census); *White* v. *Weiser*, 412 U.S. 783 (1973) (redistricting plan for Texas, which gained one seat in 1970 census).

explained that two significant events had triggered the enactment of Section 2c:

> The Supreme Court's reversal of the Indiana three-judge court in *Grills*, and the affirmance of [the district court's own August 1966 decision] last January, of course, focused Congressional attention on the fact that [Section 2a(c)] was indeed a Congressional command to the federal three-judge court in Indiana and to this Court to order elections-at-large in the event the Legislatures of Indiana and Missouri should fail to pass a constitutional redistricting act in time for the 1968 elections.

279 F. Supp. at 968. As a result of Congress's newfound attention, the enactment of Section 2c "relieved [the district court] of the prior Congressional command to order that the 1968 and succeeding congressional elections in Missouri be held at large." *Id.* at 969. The court concluded that therefore, contrary to its 1966 ruling, if the legislature fails to enact a constitutional plan, the court "will be free * * * to direct appropriate proceedings that will enable it to make an appropriate redistricting order." *Ibid.* Accordingly, the *Preisler* court held that the unqualified mandate of Section 2c superseded the "prior congressional command" of Section 2a(c)(5) that Missouri's congressional delegation would have to be elected on an at-large basis.

b. Since *Preisler*, every court that has addressed the issue has held that Section 2c requires courts whenever possible to draw single-member districts, notwithstanding Section 2a(c). In *Shayer* v. *Kirkpatrick*, 541 F. Supp. 922 (W.D. Mo.), aff'd, 456 U.S. 966 (1982), the court found that after the 1980 census Missouri had again failed to enact a constitutional districting plan. Considering the remedial options, the court noted that

it could fashion a districting plan or could order at large elections pursuant to Section 2a(c)(5). The court noted, however, that Section 2c "appears to prohibit at-large elections." *Id.* at 926. The court recognized that "repeals by implication are not favored," but it nonetheless held that "the plain language of section 2c is inconsistent with section 2a(c)(5), warranting a finding of repeal by implication." *Id.* at 927. The court also based its conclusion on the fact that "nothing in section 2c suggests any limitation on its applicability" and the floor debate on Section 2c (discussed above) "indicates that Congress intended to eliminate the possibility of at-large elections, including those in situations where the legislature had failed to enact a plan." *Id.* at 926.

In *Carstens* v. *Lamm*, 543 F. Supp. 68 (D. Colo. 1982), the court reached a substantially identical result, although the court specifically noted that Section 2a(c) retains vitality in cases in which compliance with Section 2c is impossible. At issue in that case was Section 2a(c)(2)—a correlative of Section 2a(c)(5) that required at-large election of *additional* Representatives if districts had not been created under state law. The Court explained that "Section 2c prohibits a legislature or court from deliberately designing a redistricting plan which would elect at-large representatives," thus eliminating the effect of Section 2a(c)(2) in the case before it. *Id.* at 77. Characterizing Section 2a(c) as a "stop-gap measure," *id.* at 77 n.23, the court found that Congress did not repeal it because "[a]rguably, Congress * * * did not want to leave a state without a remedy in the event that no constitutional redistricting plan exists on the eve of a congressional election, and there is not enough time for either the Legislature or the courts to develop an acceptable plan." *Id.* at 77. As the court noted, "[t]here is nothing in the language of

Section 2a(c)(2) which indicates that Congress intended to bar the federal courts from providing timely assistance to the state in resolving a redistricting dispute." *Id.* at 78.

Finally, the California and Virginia Supreme Courts have reached the same conclusion. After the 1970 census, California had gained five seats in the House, but the State had failed to enact redistricting legislation. In *Legislature* v. *Reinecke*, 492 P.2d 385 (1972), the California Supreme Court explained that accordingly, "unless congressional districts are reapportioned, the office[s] of five representatives will either have to be left unfilled or filled by statewide elections." *Id.* at 390. Citing 2 U.S.C. 2c, the court concluded that it "cannot accept either alternative, for Congress has expressly provided that California shall elect 43 representatives *from 43 single member districts*." *Ibid.* (emphasis added). In another, similar situation that arose after the 1980 census, the California Supreme Court again concluded that Section 2c "forbids the use of statewide elections to fill congressional seats" and that "the legislative history of section 2c reveals, as does its plain language, that Congress intended 2c to supersede the provisions of section 2a, subdivision (c)." *Assembly of the State of Cal.* v. *Deukmejian*, 639 P.2d 939, 953-954 (Cal. 1982).[8] Accord *Simpson* v. *Mahan*, 185 S.E.2d 47, 48 (Va. 1971) (holding that, in light of Section 2c, the

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[8] In *Republican National Committee* v. *Burton*, 455 U.S. 1301 (1982), then-Justice Rehnquist denied a stay of the court's order providing for new districts in California. He noted that he did not reach any question regarding the effect of Section 2c, because he found that the state court's judgement "appears to be based on adequate and independent state grounds." *Id.* at 1302. The full Court subsequently dismissed the appeal. See *Republican Nat'l Comm.* v. *Burton*, 456 U.S. 941 (1982).

court could not order the state board of elections to certify congressional candidates for election at large).

C. Cross-Appellants' Construction Of The Relevant Statutes Would Produce Absurd Results

1. Cross-appellants' theory produces absurd and unusual results that Congress could not have intended. If a State that has lost one or more seats after a decennial census, like Mississippi here, enacted a statute requiring at-large election of its congressional delegation, the statute would clearly violate Section 2c, even under cross-appellants' theory that it restricts legislative action only. Under cross-appellants' theory, the at-large election plan would violate Section 2c, yet as a remedy Section 2a(c)(5) would require the court to order the State to conduct an at-large election—thus making the remedy precisely the same as the violation. The same would be true if a State gained seats and enacted a statute to fill them by at-large election. Although such a statute would plainly violate the single-member district mandate of Section 2c, a court's only choice in remedying the situation would be to order the State to fill the new seats under Section 2a(c)(2) by at-large election. Congress could not have intended that result when it enacted Section 2c.

2. In addition, cross-appellants' construction would have other odd effects. The general scheme of Section 2a(c) is to require the use of "the districts then prescribed by the law of [the] State" after a decennial apportionment, 2 U.S.C. 2a(c)(1) and (3). If the districts provided for in the State's pre-apportionment law are too few in number, the districts that exist are to be used and the extra seats are to be filled through at-large elections. 2 U.S.C. 2a(c)(2) and (4). If the districts provided for in the State's pre-apportionment law are

too many in number, the entire delegation is to be elected at large. 2 U.S.C. 2a(c)(5).

Unless Section 2c's single-member-district mandate is permitted to have effect, the scheme of Section 2a(c) would make little sense. Unless population change is uniformly distributed across congressional districts, a State's pre-census districts will generally be malapportioned under one-person, one-vote principles after a new census, and accordingly a court will not be able to use them in drawing a districting plan. That creates a strange checkerboard pattern of coverage for Section 2a(c). If the State keeps the same number of seats and is unable validly to redistrict itself, a court is free to draw single-member districts, because using the State's existing districts under the mandate of Section 2a(c)(1) would be unconstitutional under one-person, one-vote principles. If the State gains seats and is unable validly to redistrict itself, then the new seats must be elected at-large under Section 2a(c)(2), but the court is free to draw new districts for the number of seats the State had at the last census; once again, one-person, one-vote principles will likely preclude the use of the State's own pre-apportionment districts. In that situation, even though there is a palpable need to draw new districts for the new seats, the court may only draw districts for the old number of seats in the House. And where a State, as here, loses seats and is unable validly to redistrict itself, the only remedy would be at-large election of the entire delegation—even if that meant a chaotic at-large election of, for example, all 29 seats in the New York congressional delegation (reduced from

31 to which New York was entitled after the 1990 census).[9]

It is very unlikely that Congress intended that kind of coverage of Section 2a(c), which appears to permit courts to draw districts and require courts to order at-large elections in a way that serves no recognizable goal or purpose. Section 2c's unequivocal mandate that Members of the House of Representatives should be elected from single-member districts (except where exigencies of time render that impracticable, see *Carston* v. *Lamm*, *supra*) resolves that problem. It creates a workable and sensible regime that faithfully fulfills Congress's purpose when it enacted Section 2c in 1967. Cross-appellants' contention that the federal court in this case could simply disregard Section 2c should be rejected.

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[9] The possibility of such chaos may have been reasonably remote in 1941, when Section 2a(c)(5) was enacted. But it became much greater by the time of the enactment of Section 2c, after *Baker* v. *Carr*, 369 U.S. 186 (1962), and the enactment of the Voting Rights Act of 1965, both of which increased the likelihood that a state congressional redistricting plan would be held invalid and the State would be left without a valid congressional districting plan. See also *Shaw* v. *Reno*, 509 U.S. 630 (1993) (recognizing constitutional racial redistricting challenge to congressional districts); *Bush* v. *Vera*, 517 U.S. 952 (1996) (same); *Miller* v. *Johnson*, 515 U.S. 900 (1995) (same). If and when that happens in a State that has lost one or more Representatives after a decennial apportionment, cross-appellants' construction would leave large States at the mercy of chaotic at-large elections required by Section 2a(c)(5).

CONCLUSION

If the Court affirms the district court's order enjoining use of the state-court plan, the remedial order of the district court should be affirmed.

Respectfully submitted.

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